Supreme Court, U.S.
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No.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

K. W. PRUNTY, Warden, et al., *Petitioners*,

v.

JAITSEN J. SINGH, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

JAITSEN JAINANDUN SINGH,
Defendant and Appellant.

OPINION
Filed December 3, 1987

APPEAL from the Superior Court of San Bernardino County. Philip E. Schaefer, Judge. Affirmed.

Keith C. Monroe for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, M. Howard Wayne and Tim Nader, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jaitsen Jainandun Singh of two counts of first degree murder (Pen. Code, § 187) and one count of soliciting an act of murder (Pen. Code, § 635f). He was sentenced to prison and appeals, claiming the trial court erroneously denied his pretrial motion to dismiss in which he challenged the racial makeup of jury venires in the West Valley Division of San Bernardino County. He also claims the evidence at trial was insufficient to support the murder verdicts and his counsel below was incompetent. We reject his contentions and affirm.

FACTS

Singh, a self-employed plumber, took out and maintained a million dollar life insurance policy[1] on his wife of 15 years, Grace. In January 1983, he told Raymond Copas[2] he would pay him $10,000 to murder someone. He took Copas to his home. He told Copas he had alrady greased the hinges on the door so there would be no noise when Copas entered. He offered Copas keys to the house and to Grace's car. He told Copas the victim would be entering the garage from the house between 5 and 5:15 a.m. on her way to work. He told Copas to wait for her there, hit her over the head with a baseball bat "to silence her," tie her up, put her in the trunk of her car and drive her to either Palm Springs or Los Angeles and abandon her car there. Copas was also to take things of value from the home and the victim's purse "to make it look like a robbery." Singh added Copas was to use gloves so he would not leave fingerprints and to close the garage door before departing. Singh told Copas he (Singh) would not be there during the killing.

The next day, Singh called Copas and asked him why he had not "done the job." Copas told Singh he would do it in his own time. When Singh did not subsequently contact Copas, the latter assumed the "contract [was] over," and he did nothing.

Two months later, Singh again contacted Copas and hired him to beat up a Riverside man. Singh drove Copas to the man's house. Copas got out, beat the man with a stick, then returned to Singh's car, and they drove off.

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1. Singh testified he made only "$5,000 and $10,000 during 1983," yet the premiums on this insurance policy and an identical one on his life were $200 per month. Before her death, his wife also worked, for the phone company as a tester.

2. Copas had a criminal history and was a heroin user.

Around the spring of 1983, Singh contacted Wendell Wixon, a family friend.[3] Singh asked Wixon if he would "take somebody out" for him. Wixon told Singh to do the job himself. Singh asked Wixon to get him some cyanide because he wanted to "take . . . out [a] South America[n] political figure." Wixon got the cyanide and gave it to Singh, but later asked Singh to return it. Singh said he could not because after trying it unsuccessfully on an animal, he "flushed it." A short time later, Singh gave Wixon a list of several poisons, with a notation at the bottom in Singh's handwriting "tasteless, fast-acting, untraceable."[4] He told Wixon to get him the first poison on the list, "botulinus toxin," because it was fast-acting and dissipated, but if he could not, to just "go right on down the line."

Singh had previously told John Vasquez that he no longer loved Grace and they were "living like friends." Singh asked Vasquez to "get him one of [Vasquez's] girlfriends," and he named one specifically to whom he had taken a fancy. He gave Vasquez money to give to the woman, but Vasquez pocketed the money instead and the woman told Vasquez she was not interested in Singh.

In the summer, Grace and her 17-year-old daughter, Daphne (whom Singh had adopted when he married Grace[5]) went to Holland to visit Grace's family. While they were away, Singh met and began an affair with Martha Meza. He told Meza he wanted

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3. Wixon had an extensive criminal background. He also saw the Singh family socially. His mother was Grace's best friend.

4. Singh admitted compiling the list, but claimed he had done so at Wixon's insistence during a friendly conversation about the use of poisons for hunting, fishing and pest control.

5. Singh testified that in Holland, where he and Grace were married, the adoption of stepchildren automatically occurs with the marriage. He also said it was the custom of his culture to accept a spouse's children as your own.

to divorce Grace and, together with his teenage son, Suren,[6] he would "make a future with" Meza and her children. After Grace and Daphne returned from Holland, Singh took Suren to Meza's house and introduced her to him. Thereafter, he and Suren took several trips with Meza and her children, including an overnight camping trip to Arizona. Singh spent money freely on Meza and her children, as they were in dire financial straits. Meza continued to see Singh on a daily basis and he continued to tell her he was going to divorce Grace.

While Grace had been in Holland, she had purchased $2,500 worth of gold jewelry, which she brought back with her. Singh showed the jewelry to Meza a number of times before finally leaving it with her, telling her she could wear it then and that it would become hers later when they were married.

In early August, Meza told Singh if he really loved her, he should propose to her. He did. The following day, Singh and Meza, along with her brother and sister-in-law went to a jewelry store in Los Angeles, where Singh paid over $500 for an engagement and wedding ring set for Meza. They celebrated later at a restaurant in Chinatown. The following week, Singh became very tense, anxious and nervous. He told Meza he was fed up with the situation at home and he and Grace were constantly fighting. He said he hated Grace and Daphne because they were mistreating Suren. He said Grace had told him she was planning to divorce him and that made him angry because "nobody walks out on him -- he's a winner," that it was all right for him to divorce Grace, but not for her to divorce him. He said he wished Grace and Daphne were dead.

At the end of that week, Singh took Suren and Suren's friend on a "hunting trip." They departed the Singh house at 2 a.m. on August 27, leaving Grace and Daphne asleep on the bed in the

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6. Suren was Singh's and Grace's biological son.

master bedroom. Singh loaded up all the guns in the house and drove the boys to several locations in the high desert, but they did almost no hunting. They returned to the Singh house around 9:30 that night.

Singh drove the car into the garage and parked far enough over so that it would have been very difficult for Grace to park her car in its usual spot.[7] Singh went inside the house but hurriedly exited, saying something was wrong. He was in an excited and agitated state.

The sliding glass door leading from the outside into the kitchen was unlocked and ajar. Parts of the house appeared to have been ransacked. There were still-damp blood stains on the bed in the master bedroom. There was a bloody and damaged baseball bat in the hall. Grace and Daphne were gone. Singh told the police the jewelry that Grace had bought in Holland, plus some money, was missing from the home. He did not tell them Meza had some of this jewelery. He told the officers he believed the theft of the jewelry and money was the motive for the crimes.

Later that night, the police discovered Grace and Daphne stuffed in the trunk of Grace's car, which had been abandoned in central Los Angeles. The women had been beaten, stabbed, and strangled with electrical cords.

Almost immediately, Singh contacted his insurance agent to tell him about Grace's death. Two days after the murders, he met Meza at a motel room and had sex with her, explaining this was "his way of mourning" for Grace. He told Meza to stop wearing the jewelry Grace had bought in Holland. He told her to dump it in the ocean or hide it so he could honestly tell the police he did not know where it was. Meza hid it in her brother's freezer. After telling Singh where she had put it, it disappeared from the freezer.

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7. Singh testified Grace was very particular about her car and was insistent about parking it in the garage.

While in jail on charges unrelated to this case, Copas was attacked and stabbed by two men. One of his friends later told him he was attacked because Singh had put a contract out on him.

The prosecutor conceded Singh had not actually committed the murders. Instead, he argued, Singh had either solicited or aided and abetted by getting someone else to commit them.

1. The Motion to Dismiss Based on Racial Underrepresentation in the Jury Pool

San Bernardino County employs a system of jury pool selection whereby lists of those registered to vote and those over 18 who have obtained drivers' licenses or identification cards from the Department of Motor Vehicles (DMV) are combined. A computer then randomly selects those who are summoned from the combined lists.

In his pretrial attack on this system, Singh incorporated into the record an identical motion and evidence presented on it, which had been unsuccessfully brought in an earlier case. In addition, he offered statistics based on the members of the jury venire who actually appeared for this trial, as well as the supplemental testimony of a witness who had testified in the previous case.

Singh contended Hispanics were grossly underrepresented on jury venires in the West District[8] of San Bernardino County when he was being tried. He claimed this underrepresentation was attributable to the district's failure to send follow-up summons to those who did not respond to the first jury summons they received.

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8. The parties in the case whose record was incorporated by reference here referred to the West Judicial District as covering census tracts 1-22 of San Bernardino County, excluding tract 7, which comprises the Men's Penal Colony at Chino.

The bulk of defense evidence on underrepresentation in the case incorporated here came via the testimony of Dr. Edgar Butler, Chairman of the Sociology Department at University of California at Riverside and Adjunct Professor at University of California at Irvine.[9] Butler testified he surveyed the number of potential jurors who appeared in the West Valley District jury room during the month of August 1984. (The motion was heard in Nov. 1985.) Of those, 11 percent were Hispanic. In contrast, according to the 1980 census, Hispanics comprised 18.5 percent of the total population of San Bernardino County. This created an "absolute disparity" (i.e., the difference between the two) of 7.5 percent. Using a statistical formula, Butler computed the "comparative disparity," which measures the probability an Hispanic will appear in a jury pool, to be 41 percent underrepresentation. Butler took his analysis one step further by computing the "Z score," which measures the probability the comparative disparity exists by chance. He concluded there was less than a 3 out of 100,000 chance Hispanic underrepresentation occurred by chance.

Butler also made calculations based on the population of the area served by the West District. He found 21.1 percent of the population of the district is Hispanic, creating a 10.1 percent absolute disparity, a 48 percent computation disparity and a "Z-score of definitely less than 3 chances in . . . 100,000."

Based on these figures, Butler opined Hispanics were severely underrepresented in West District jury pools and this underrepresentation was "systematic," i.e., it is "due to some rule or procedure of the selection system [and] . . . regularly occurs and is inherent in the source from which jurors are drawn." (In re Rhymes (1985) 170 Cal.App.3d 1100, 1112, 1113.) He suggested some possible causes, one of which was the district's failure to send

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9. Butler had testified as an expert witness in People v. Harris (1984) 36 Cal.3d 36, and in a number of other cases throughout the United States.

a second mailing to potential jurors who did not answer the initial summons.

Butler's opinion the follow-up mailing would bring more Hispanics into the jury pool was based on an experiment Butler had performed in Riverside in 1963. He sent 8,000 letters to randomly selected people in which he asked them for an interview at their convenience. In the letter, he enclosed a stamped, self-addressed envelope for reply. He stated, for the most part, minority members did not respond. Everyone who did not respond was sent a registered second mailing. He testified of those who responded to this, 66 percent were minority and 33 percent were white. However, he also admitted he counted among the "responses" those who just signed for the registered letter and did nothing else. He further admitted the experiment was done primarily as a means of locating people and not to show their comparative responsiveness. He concluded because minorities move more often than whites, they are more difficult to locate on a first mailing.

Butler acknowledged he had not considered whether the district had used reasonable means to encourage minority participation. He stated of the many districts he studied throughout California and the United States, only one (in Oregon) had a proper proportion of minority members in its jury pools.

Defense counsel had surveyed the 44[10] potential jurors who appeared for Singh's trial. Of them, five were Hispanic,[11] or 11.4 percent of the venire. This created an absolute disparity of 7.1 percent, when compared with the total Hispanic population figure

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10. One of the 44, a Caucasian woman, was later excused due to her husband's illness. Defense counsel's calculations did not take this into account.

11. Another venire person was Filipino. She was not counted among the Hispanics.

for San Bernardino County, and 9.1 when compared with the total Hispanic population in the West District.

The jury commissioner testified a system for sending second summonses to those who failed to respond to the first had begun development in December of 1984. It was expected to be fully operational in April of 1985, however, it had encountered a number of problems which caused delays. He believed the system would be fully operational by January 1986. He said work on the system had been continuous and diligent since its inception. While he opined such a system would bring in more people, it was his experience it would not increase minority representation. He did list a number of other things the district had done to encourage minority participation.

Evidence presented by the prosecutor in the previous case included a poll taken in the West District jury room which showed the number of persons per minority family exceeded the number of persons in white families, thus suggesting a significant percentage of the minority population used to show underrepresentation was under the age of 18 and therefore ineligible for jury service. The prosecutor also noted according to the United States census, there is a greater proportion among minorities of people under the age of 18 than there are among whites. The trial court here expressed concern with the absence of statistics involving those eligible for jury services, rather than total population figures.

After hearing all the above-mentioned evidence, the trial court found Singh had not met his burden of showing a dramatic underrepresentation of Hispanics on the jury venires. Accordingly, the court denied the motion. Singh now contests the court's conclusion.

"In order to establish a prima facie violation of the fair-cross-section requirement [of jury pools], the defendant must show (1) that the group alleged to be excluded is a 'distinctive'

group in the community [which both sides agree Hispanics are]; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." (Duren v. Missouri (1979) 439 U.S. 357, 367-368.)

Recently, in O'Hare v. Superior Court (1987) 43 Cal.3d 86, the California Supreme Court held the term "community," for purposes of demonstrating a fair cross-section in jury pools, means the judicial district in which the challenge is made. The evidence presented here shows that, based on total district-wide population, Hispanics are underrepresented. However, it is Singh's use of total population figures that we, like the trial court, find disturbing.

In People v. Harris (1984) 36 Cal.3d 36, 53-54, the California Supreme Court said:

"Criticism has been appropriately leveled at the use of total population figures as the comparison base for showing underrepresentation. [Citations.] However, such criticism of the statistical short-coming of the use of total population figures fails to acknowledge the difficulty in obtaining more refined comparison groups. [¶] Comparing the makeup of the actual jury pool with that of the entire population of persons presumptively eligible for jury service would be preferable to comparing with total population because if the cognizable class has a lower percentage of jury eligibles than the general population, a showing that that class' representation in the jury pool is less than the group's percentage of the general population does not necessarily show that the group is underrepresented. 'Nevertheless, because it may be difficult to obtain full and accurate figures for jury eligibles and to require such data may place an insuperable burden on a litigant, this preference must accede to tolerance.' [¶] In our view, although more refined statistics would be preferable if available, where they are not, it is sufficient for the defendant to show a

significant disparity based on the use of total population figures." (Emphasis added.)

The Harris court mentioned one factor which stands in the way of accurate reporting of juror-eligibles which is particularly relevant in Southern California -- the presence of illegal aliens. There are other factors as well -- the number of those who lack sufficient language skills to serve as jurors, those previously convicted of a felony, and legal resident aliens. (People v. Alexander (1985) 163 Cal.App.3d 1189, 1201-1202.) It is these factors that make counting the number of juror-eligibles so difficult. It is this difficulty that Harris decided should be shouldered by the People and not by the defendant when the latter challenges the jury pool. However, there remains one significant factor which Harris did not explicitly address -- one factor which, unlike the others, is susceptible of easy documentation -- age.

The same census report relied on by the parties here also divides up the Hispanic population in the West District according to age. According to the report, a full 43 percent of that population is under the age of 18, and, therefore, ineligible for jury service.[12] This statistic is readily available, and, therefore, under Harris, should have been part of the computation of comparative disparity and "Z scores" used by the defense. It is noted with great interest that in cases where the defendant attempts to prove underrepresentation using statistical disparity figures, such as was done here, adult population figures, not total population figures are utilized in the formulas.[13]

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12. Upon the request of the People, this court takes judicial notice of pages P-74-75, 87-96 of the 1980 census.

During his testimony, Dr. Butler, himself, conceded such statistics were readily available. We believe the burden of using these more accurate statistics rested squarely on Singh's shoulders and should have been met below.

13. See, e.g., Duren v. Missouri, supra, 439 U.S. 57; People v. Pervoe (1984) 161 Cal.App.3d 347; People v. Buford (1982) 132

The existence of this 43 percent figure persuades us to agree with the trial court that Singh had not met his burden of proving sufficient underrepresentation. Singh also failed to carry his burden of proving a follow-up mailing system would cure whatever degree of ethnic disparity which actually might exist. (See People v. Pervoe, supra, 161 Cal.App.3d at 353.)

Finally, we heed the sage words of the court in People v. Alexander, supra, 163 Cal.App.3d at 1189, 1201-1202, reminding us that a certain amount of disparity is "due to economic, cultural, social or language considerations [which are] beyond the control of the judiciary." The trial court correctly denied Singh's motion to dismiss.

2. Insufficiency of the Evidence

Singh reiterates the well-established rule that in order to reject his present claim of insufficiency of the evidence, this court must view the evidence in the light most favorable to the prosecution and conclude that such evidence could convince a rational trier of fact that Singh is guilty beyond a reasonable doubt. His attack on all three verdicts is based on his criticism of Raymond Copas' veracity. While Singh concedes Copas' testimony is not inherently improbable, he argues it is "so riddled with holes that it is unworthy of jury consideration." The "holes" he cites are (1) Copas' conflicting statements as to the amount of money Singh agreed to pay him for murdering Grace and (2) his failure to come forward immediately after learning of the deaths. We recognize that Copas' statements at times conflicted, just as do those of many

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Cal.App.3d 288; see also People v. Alexander, supra, 163 Cal.App.3d 1189, 1202.

Statistical experts who urge courts to use the absolute disparity, comparative disparity and "Z score" methods specify that the formulas are to be based on either adult or eligible population figures. (See Kairys, Kadance & Lehoczky, Jury Representativeness: A Mandate for Multiple Source Lists (1977) 65 Cal. Law Rev. 776.)

witnesses in criminal cases. We also recognize the fact Copas functioned in the criminal world when often "honor among thieves" exists until "snitching" becomes advantageous. The jury was well aware of all this, received instruction on it and chose to believe Copas in part or in full. Based on the two weaknesses Singh now points to in Copas' testimony, we cannot conclude a rational trier of fact must entirely reject his testimony.

Singh also argues there was insufficient evidence to support his conviction for the murder of Daphne, because, assuming he had hired Copas in January, he did so only to murder Grace and not Daphne. This ignores, however, the events occurring between January and August, some of which drove Singh to express his hatred for Daphne, as well as his wife, and his wish that they both die.

Singh also argues the brutal way in which the women were killed belies the prosecution's theory they were murdered by paid killers. However, since we do not know who the killers were, we have no way of knowing how proficient they were at their "craft." This may have been their "first job." The women may have struggled or said something to provoke them. Singh may have been so angry and frustrated at his domestic situation that he ordered the killer(s) to be brutal. The killers may be particularly "mean" people.

Singh argues the freeway trip and abandonment of the bodies in Los Angeles are not the marks of hired killers. Again, we are not talking about a skill for which one is educated in acceptable methods and licensed. The killer(s) could have been of great or little intelligence and sophistication, or of abundant or no common sense. Granted, they did not "do the job" like Mafia hit men, but they probably were not Mafia hit men.

The evidence presented showed tremendous motive on Singh's part to kill both women. It showed he had, at the very least, thought about the crimes a number of times before. During

Singh's lengthy period on the stand, he showed himself to be possessed of some unusual attitudes and hard-to-swallow explanations for his behavior and activities. The jury was fully justified in reaching the verdicts it did.

3. Ineffectiveness of Counsel

Singh first criticizes his trial attorney for failing to move for acquittal at the close of the People's case. Except for whatever harm Singh did to himself by taking the stand, all the remaining evidence discussed above had been presented during the People's case-in-chief. We, like the People, see in this evidence sufficient grounds for conviction of all three offenses, thus, a motion to acquit would have been pointless. We see no error in this regard.

Singh also faults his attorney for failing to make an opening statement and for calling him as the defense's first witness. We agree with the People that counsel's tactical decision not to make an opening statement due to the length of the trial was well-founded. We also agree that Singh's current indignation with being first called as a witness hardly elevates this tactical decision to error.

The main thrust of Singh's argument his attorney was incompetent is embodied in counsel's remarks to the jury. Counsel began by telling the jury that instead of rehashing the evidence for four or five hours, he was going to make his remarks brief. He specifically addressed the testimony of the major prosecution witnesses, bringing up the same points of weakness Singh cites here. He focused on the reasonable doubt standard. He made the cogent point that beyond this being a credibility contest -- Singh versus the prosecution witnesses -- the jury had to be convinced of Singh's guilt beyond a reasonable doubt. He proposed a believable theory that it was actually Copas or Vasquez, on his own, who murdered Grace and Daphne, then tried to frame Singh for the crimes. We believe neither the brevity of

counsel's remarks nor their substance showed he was incompetent.

Finally, Singh takes his strongest stand on the incompetency issue citing the following remarks of his attorney during argument to the jury:

"[T]he police officers [who testified] . . . know how to testify. My client doesn't know how to testify. He's never testified before. [¶] I will not repeat what Mr. Stout said because he's correct,[14] but then it is more than just having an intuition that Mr. Singh is guilty. It has to be more . . . than that. Sometimes . . . you get a gut reaction. More likely than not, this man did something wrong, that he's guilty. You have to then look at this, referring to the standard of proof and go beyond that. There's no set points, but I'll tell you that it is beyond this. So what I'm trying to convey to you is the task that you will be facing, probably what I see you will be facing, and also the analysis that you're going to have to follow when applying all the law.

". . . . . .

"To some extent, it becomes a matter of who are we going to believe. Are we going to believe the defendant, or are we going to believe all of the witnesses? Well, I think it's beyond that. I think it's a matter of applying the right standards to the right groups of facts once you analyze it. . . ."

After suggesting at length Copas was the murderer or one of the murderers and he presented no alibi for the period of time covering the crimes, counsel went on to say:

". . . Mr. Singh may be the most obnoxious person whoever lived, and you probably didn't like him when he testified; he looked bad; he said certain things that just didn't seem reasonable to you or believable or something. I don't know. My point is that

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14. The record does not disclose to what in the prosecutor's lengthy remarks counsel is referring.

obviously he did not testify like [the police officers]. They've testified hundreds of times from the witness stand.

"Mr. Singh may be a lot of things. One thing he is, he is not a killer. . . . I would challenge that if there would be anybody who can testify in any way, shape, or form, and that person is free of any inconsistencies in testimony, that is an impossibility. If you don't think that, apply any standard that you want, and you will find humans are humans. Make mistakes.

"The point is, did Mr. Singh have somebody else kill his family? Well, I have a lot of questions. . . .

". . . But, you see, you have to apply the standard, and . . . it is not enough to convict a man with this type of evidence. That's what I'm saying."

Singh now contends that by suggesting he may be obnoxious, and may have made some unreasonable or difficult-to-believe statements during his testimony, defense counsel abandoned his cause and withdrew his defense, as in the cases Singh cites in his brief.[15] This is simply not the case. Counsel was merely arguing

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15. In People v. Diggs (1986) 177 Cal.App.3d 958, a beating and rape case, defense counsel asked his client on direct examination to elaborate upon an irrelevant and highly inflammatory matter, asked him about his "aggressive sexual attitude" toward the victim, and elicited from him the fact that his failure to get an erection "teed him off . . . or [caused him to] . . . freak out . . . ." Counsel also solicited no evidence from his client on direct about the defenses he was supposed to present of intoxication and nonparticipation. Counsel followed this up with a "largely incoherent" argument to the jury which the Court of Appeal described as "bizarre." In it, counsel failed to argue either defense, relying instead on a nondefense that television and rock music created a nihilistic society in which sexual crimes occur. In short, counsel "admitted [his client's] participation in the crimes and asked the jury to consider a nondefense by way of excuse." (Id., at 968.) The court concluded counsel had improperly "argue[d] to the jury his client is guilty." (Id., at 970.)

In People v. Cropper (1979) 89 Cal.App.3d 716, defense counsel, at sentencing, concluded his client who was presumptively eligible for probation should be sent to prison for the aggravated term despite his

that while his client may have looked bad on the stand, an entirely reasonable observation under the circumstances,[16] this should not serve as the basis upon which to convict him. This did not constitute incompetency.

The judgment is affirmed.

Hews, J.

We concur:
Campbell, P. J.
McDaniel, J.

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client's contrary wishes. The court concluded counsel had violated his duty to represent his client zealously and not to argue against him.

In People v. Lang (1974) 11 Cal.3d 134, appellate counsel, in his brief before the court, noted while his client contended the testimony of the two victims was so incredible that the conviction must be reversed as impossible, he said, "'I am not in agreement with this contention.'" He made no argument in support of his client. He merely attached a copy of a "brief" written by his client.

Finally in People v. Davis (1957) 48 Cal.3d 241, defense counsel was suffering from an acute mental disorder. After arguing to the jury consistently with the alibi evidence presented by the defense witnesses, he told the jury the following day he was wrong, and he presented a whole new theory, based on facts unsupported by the evidence. He also attacked the credibility of a defense witness and upheld the veracity of witnesses for the prosecution. He suggested his client had told him he was actually at the scene of the crime. The court concluded counsel had, in essence, pleaded guilty for his client without the client's consent.

Here, in contrast to the above discussed cases, counsel did not abandon his client's defense which was a reliance upon the reasonable doubt standard. He argued this vehemently to the jury and urged it to acquit his client.

16. Of course, we are without benefit of witnessing Singh's demeanor on the stand. The cold record, however, discloses a number of highly questionable explanations and unusual attitudes which Singh offered during his testimony, particularly upon cross-examination by the prosecutor.

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

In re JAITSEN J. SINGH
on Habeas Corpus.

RULING ON PETITION
FOR WRIT OF HABEAS CORPUS
Filed February 16, 1994

This matter came on regularly for an evidentiary hearing before this court on July 1, 2 and August 6, 1993. The petitioner was present and he was represented by Riordan and Rosenthal, by Dennis P. Riordan, Esq. The respondent District Attorney of San Bernardino County was represented by Deputy District Attorney Grover D. Merritt.

At the conclusion of the hearing, the issue of the admissability of the declaration of Raymond Copas was taken under submission by this court pending the receipt of further written briefs on the issue.

In a Minute Order dated September 21, 1993, this court ruled that most of the contents of the Copas declaration was admissible. A briefing schedule was established in that same Minute Order for the written arguments from both sides.

All those briefs have now been received and this matter is now ready for decision.

I

ORIGINAL GROUNDS ALLEGED IN PETITION

In the Petition for Writ of Habeas Corpus which the petitioner filed back on July 23, 1992, he alleged that his continued incarceration in State Prison was illegal for the following reasons:

"A. The deliberate concealment from petitioner of benefits afforded by the state to its primary witness, Raymond Copas, deprived Singh of his Sixth Amendment right to confront witnesses against him.

B. The knowing introduction and use by the prosecutor of false testimony at trial deprived petitioner of due process of law under the Fourteenth Amendment of the United States Constitution, and Article I, section 7 of the California Constitution.

C. Trial counsel's failure to investigate or present the defense case adequately deprived petitioner of his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution, 6th Amendment, and Article I, section 15 of the California Constitution.

D. Instructional errors deprived petitioner of a fair trial."

II

DISPUTED FACTS RAISED BY PLEADINGS

In a Minute Order dated January 21, 1993, this court granted petitioner's request for an evidentiary hearing because there appeared to be a dispute as to at least the following material facts:

1. Whether the prosecution witness Raymond Copas actually received any valuable benefits (i.e. dismissed charges, continuances, reduced

penalty, etc.) as the direct result of his trial testimony against the petitioner?

2. If so, did the prosecutor Dennis Stout become aware of any agreement to provide any benefits to Copas prior to his calling Copas as a witness to testify against the petitioner?

3. Was Copas still a drug addict at the time he testified against the petitioner?

4. If so, was the prosecutor aware of that fact at that time?

5. Was the denial by Copas under oath that he had not used drugs for months prior to the time of his testimony false testimony?

6. If so, was the prosecutor aware of that fact at that time?

7. Did petitioner's trial counsel, Mr. Espinoza, adequately investigate and prepare the case for trial?

8. If not, was such failure motivated by any tactical reasons?

By the time of the evidentiary hearing, petitioner had abandoned his claim of illegal incarceration based on the grounds of incompetency by trial counsel and instructional errors at trial. Therefore, questions 7 and 8 in the above list had become moot.

III

FINDINGS OF FACT

Based upon a review of the testimony presented by the witnesses during the evidentiary, the various exhibits received in evidence and the post-hearing briefs of counsel, this court makes certain findings of fact as follows:

1. Misdemeanor Cases Pending When Copas Came Forward.

Raymond Copas was charged with a misdemeanor narcotics offense which occurred on April 3, 1984. (HT 212). Copas was in custody on this charge when he contacted Detective Carrillo and claimed to have information on the Singh murders. (HT 70, 106, 128-129). Copas also had a pending five count theft case at that time. (HT 71, 73-74, 202-204).

2. Misdemeanor Cases Continued.

On May 5, 1984, Copas testified at the first Singh preliminary hearing. (HT 189). Subsequently, Copas' pending theft and narcotics cases were continued several times over the course of the year. (HT 59-60, 77-80, 215-215, 217-218).

3. Copas Asks For Help On Burglary Arrest.

On March 28, 1985, Copas was arrested on a burglary charge. He used a ruse to bring Detective Underhill to the jail so he could request assistance in gaining release on the burglary case.

4. Stout Makes Bail Motion on Copas' Behalf.

Copas was arrested on a narcotics charge in April of 1985. In May, Mr. Stout made a motion for Copas' release on his own recognizance on his pending misdemeanor and felony cases. (HT 40, 86-88, 138-139).

5. Misdemeanors Dismissed.

On August 1, 1985, Copas entered an open plea of guilty to the March 1985 burglary with a maximum three year sentence. Six pending misdemeanor charges were dismissed at the same time. (HT 2-4, 88, 144).

6. Conversation Between Stout and Flores on September 13, 1985.

On September 13, 1985, Copas was scheduled to be sentenced on the March 1985 burglary offense. Ms. Patricia Diamond appeared on Copas' behalf and Mr. Stout appeared for the District Attorney's office. (HT 89-90). Ms. Diamond made an entry in her office file on this date as follows: *"Note D is testifying for D Stout on PC Singh 187 case. Something will be done for D after testimony - cont till that case is over."* (HT 27, 44-45). Mr. Stout acknowledged that a conversation may have taken place between himself and Ms. Diamond, but he had no specific recollection of what they discussed. (HT 182).

7. Conversation Between Stout and Copas' Probation Officer.

Mr. Stout spoke with Copas' probation officer regarding the March 1985 burglary conviction and said that Copas was cooperative. Mr. Stout also stated his belief that if Copas was sent to prison "he might get killed." (HT 91-92, 153-154, 169, 175). (Mr. Stout either called the officer or was called by her because

she had been routed to Stout as the prosecutor handling Copas' case).

8. Burglary Proceedings Continued and Consolidated.

On December 1, 1985, Copas was arrested on another burglary charge. (HT 31-33, 39, 91, 149). Copas testified for the prosecution in Singh on December 11, 1985. (HT 91, 151-152).

On December 20, 1985, Copas' March 1985 burglary case was continued at the District Attorney's request in order that a satisfactory disposition could be reached on both burglary cases. (HT 250).

On January 15, 1986, the Copas preliminary hearing on the December 1985 burglary was continued to February 5th. In Copas' case file, Ms. Diamond noted: "*Atty - whoever has this case on 2-5-86 see me before court and talk to Dennis Stout, D.A. - Special Problem*". (HT 39-40).

On February 5, 1986, Copas pled guilty to the December 1985 burglary charge. (HT 157, 182-183).

Mr. Stout and Ms. Diamond appeared for Copas' sentencing for both burglaries on March 19, 1986. (HT 36, 90-91, 152, 159). The contents of Copas' probation report certainly warranted a state prison sentence. Nevertheless, his probation officer recommended probation. (HT 237-238).

Copas was given a county jail sentence on the March 1985 burglary and a suspended sentence on the December 1985 burglary. (HT 36, 91, 159-160).[1]

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1. In light of Copas' criminal history, the sentence actually handed down was lenient based on the experience of this court. (HT 37-38, 47, 54-55, 172-173, 220-225, 237-238, 252).

On August 1, 1986, Copas' sentence was reduced and modified to credit for time served. (HT 162, 198-199). Copas was ordered back to court to testify on the new trial motion in the Singh matter on August 21, 1986. (HT 199-200). Copas testified in opposition to defendant Singh's motion. (HT 200).

9. Copas' Use of Heroin And His False Testimony Concerning His Addiction.

During Copas' trial testimony he stated that he had been a heroin addict seventeen years before. He further stated that he still used heroin "on occasion." He also stated that he did not remember the last time he had taken heroin, but that it had been "quite a while ago." Copas denied that he had taken heroin within the last week, month, or even three months before his testimony, rather stating: "It could have been five, seven months, eight months, a year ago . . . ."

It was Copas' continuing involvement with heroin that led to his status as a witness in the petitioner's case. He was under arrest and in custody on heroin charges when he first came forward to volunteer to testify against petitioner in April of 1984. (HT 105-106). Although Copas would later deny under oath at trial that he had taken heroin on this occasion, his urine sample tested positive for heroin (HT 94-96), and Mr. Stout stipulated to the positive result and to the fact that Copas had admitted heroin use to the arresting officer. (Id.)

A year later, while waiting to testify against the petitioner and despite being in a witness protection program that provided for his needs (HT 209), Copas committed a burglary and theft, the classic offenses of a heroin addict in search of funds. (Ex. 4). After being released on that charge, Copas was arrested for being under the influence of heroin on April 12, 1985. (Ex. 20). In December of 1985, only a few days before he testified against Singh, Copas was again arrested for burglary.

Officer Carrillo, who knew Copas to be a heroin addict (HT 208-109), admitted that upon learning of Copas' commission of the two burglaries while in the witness protection program, he thought that Ray Copas was probably still using heroin. (HT 210). Officer Underhill knew Ray Copas to be one of "our local old time heroin addicts". (HT 109) According to Ms. Diamond, who represented Copas on his burglary cases, everyone connected to his cases understood that Copas was "drug addict, heroin." (HT 47-48).

In his declaration submitted in conjunction with the state's return, Mr. Stout states under oath that:

> *"I do not recall Copas telling me why the burglaries were committed, although I certainly would have expected that Copas committed the burglaries to obtain heroin."*

Id. at 2.

10. The Lack of a Complete Brady Disclosure

Based on the contents of the transcript of the petitioner's second Preliminary Hearing in March 1985, it appears that as of March 20, 1985, petitioner's trial counsel, Edmundo Espinoza, did know the following facts about the prosecution witness, Raymond Copas:

1. Copas had been convicted of three felonies, the last one being in 1965 (RT pp. 68 and 163);

2. His first felony conviction was in 1958 for sales of marijuana (RT p. 163);

3. His second and third convictions were in 1965 for "sales, possession and failing to register." He was prosecuted both by state and federal authority (RT pp. 164 and 166);

4. In March 1985, Copas had cases pending in the Chino branch for giving false information and in the West Valley branch for misdemeanor theft (RT p. 168);

5. His family was receiving protection under the witness protection program (RT p. 169);

6. Copas had used heroin in the past (RT p. 170); and

7. His last use of heroin was about 6 years previously. (RT p. 172).

Mr. Espinoza testified during the evidentiary hearing that he either was never given (or he didn't recall receiving) the following information:

a. Copas' misdemeanor cases had been continued for over a year due to his status as a witness against Singh;

b. Copas actually received money and a residence through his participation in the San Bernardino Witness Protection Program;

c. Contrary to his sworn testimony, Copas' April 1984 heroin case was not dismissed for lack of evidence, but was dropped as part of a plea bargain;

d. Contrary to his trial testimony, Copas was not given a three year sentence on his December 1984 burglary arrest; rather, the case was never pursued by the San Bernardino District Attorney;

e. After his March 1985 burglary arrest, Copas asked Detective Underhill for help in obtaining his release. (Such request was rejected by Underhill);

f. In May of 1985, Stout sought Copas' release on his own recognizance on his pending misdemeanor and felony cases;

g. Mr. Stout told Probation Officer, Judith Marley, that Copas had been cooperative and that he might be killed if sent to prison. (It is reasonable to assume that conversation was a factor that influenced the recommendation made by Ms. Marley in Copas' March 1985 burglary case).

There is no evidence in the record that any of this information was ever imparted to Espinoza by the prosecution. Obviously, had it been communicated, Espinoza would have raised it at trial. His testimony thus stands undisputed.

IV

ISSUES

1. Was there an agreement between Stout and Copas and/or his counsel that Copas would receive some benefits in his pending burglary cases in exchange for his testimony on behalf of the prosecution against the petitioner?

2. If so, were the complete details of that agreement ever disclosed to the petitioner's trial counsel or to the trial jury?

3. Was Mr. Stout aware at the time of the trial of petitioner that Copas was a heroin addict?

4. If so, was that fact ever disclosed to petitioner's trial counsel or to the trial jury?

5. If there was a *Brady* violation by Mr. Stout, can this court make a finding that such violation was harmless beyond a reasonable doubt?

V

DISCUSSION

This court agrees with the contention advanced by the petitioner that there cannot be any doubt that Copas received some benefits from the respondent. Those benefits were basically in two forms.

First, it is undisputed that the sentencing of Copas on his pending burglary charges was continued until after Copas had testified against the petitioner. Such a delay was a clear benefit to Copas because it allowed him to present the fact of his cooperation before the sentencing judge in a plea for leniency.

In this case, as the result of the delay in sentencing, Copas actually received a reduced sentence from Judge Allen. (See Court's Exhibit No. 22). The judge who accepted the PC 859a pleas (i.e., Judge Kloepfer), explicitly based his acceptance of a probationary sentence for the December 1985 burglary on the fact that Copas had recently testified for the prosecution in the Singh case. (See Court's Exhibit No. 23).

Secondly, the evidence presented during the course of the evidentiary hearing has caused this court to conclude that the recommendation for probation in the pre-sentence report for the March 1985 burglary and the willingness of the sentencing judge (i.e., Judge Allen) to go along with that very lenient recommendation were a direct result of the helpful testimony that Copas had given on behalf of the prosecution in the Singh trial.

Given this finding that Copas did receive some substantial benefits from the respondent, the next question is whether the prosecutor in the Singh case, Mr. Stout, was aware of any agreement to provide such benefits to Copas.

The evidence indicates that on September 13, 1985, Copas was scheduled to be sentenced on a second degree burglary offense which occurred in March of 1985. Counsel for Copas was Deputy Public Defender Patricia Flores Diamond. Dennis Stout appeared for the respondent. Ms. Diamond testified that she had a conversation with Stout regarding the Copas case. Pursuant to office policy, she made an entry in the file immediately after this alleged conversation. The note read: "*Note D is testifying for D Stout on PC Singh 187 case. Something will be done for D after testimony - cont till that case is over.*" (Emphasis supplied)

Mr. Stout denied on the stand that he ever made an agreement with Copas or his counsel that any favors would be forthcoming in exchange for the testimony of Copas against the petitioner.

In an attempt to resolve this credibility issue between the conflicting testimony of Stout and Diamond on the question of an agreement, this court has considered the impact of several events that occurred both before and after September 13, 1985, which tend to corroborate the testimony of Ms. Diamond. Those events are as follows:

1. The acquiescence of Stout and his colleagues in the continuance of the pending misdemeanor cases of Copas for the purpose of awaiting his testimony at the trial of the respondent;

2. Stout's appearance on May 15, 1985, on an O.R. Motion for Copas;

3. The benefits given to Copas as the result of his placement in the San Bernardino Witness Protection Program;

4. Stout's phone conversation with Copas' probation officer, Judith Marley;

5. Copas' request for release following his March 28, 1985, arrest for burglary.

The weight of the credible evidence supports the petitioner's contention that Stout entered into an oral agreement with Copas and his counsel to assist Copas in receiving certain benefits in exchange for his testimony against the petitioner.

Stout himself conceded in his testimony that an agreement for continuances of a hearing on sentencing, even in the absence of an express promise of a sentencing deduction, would constitute a "benefit" that would have to be revealed to defense counsel as per *Brady* and its progeny.

The weight of the evidence strongly suggests that when Copas testified during the petitioner's trial that he had not used heroin prior to his trial testimony, such testimony was probably false. Furthermore, Mr. Stout knew or should have known that Copas was still a heroin addict at that time. Mr. Stout failed to satisfy his legal and ethical duty to disclose that apparent perjury to the defense counsel and to the trial jury.

VI

RESPONDENT'S DUTY TO DISCLOSE

In the landmark case of *Brady* v. *Maryland* (1963) 373 U.S. 83, [10 L.Ed.2d 215, 83 S.Ct. 1194], the United State Supreme Court imposed the duty on prosecutors in criminal cases to disclose all evidence favorable to an accused to the accused. The *Brady* court stated: *"[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process . . . irrespective of the good faith or bad faith of the prosecution."*

. . . [T]his duty on the part of the prosecution to disclose all substantial material evidence favorable to an accused at trial stems

from the due process clause of the Fourteenth Amendment of the Constitution. "(*People* v. *Garcia* (1993) 17 Cal.4th 1169, 1179.)

In 1971, the California Supreme Court, in the case of *In re Ferguson* 5C3d 525, 532-533, imposed a stricter duty upon prosecutors by requiring them to disclose substantial material evidence favorable to an accused regardless of whether there was any request for same.

Material evidence in this context is evidence which tends to influence the trier of fact because of its logical connection with the issue. (*People* v. *Morris* (1988) 46 Cal.3d 1, 30, fn. 14).

The duty to disclose evidence favorable to the accused extends to evidence which may reflect on the credibility of a material witness. (*People* v. *Ruthford* (1975) 14 Cal.3d 399, 406; see also *Siglio* v. *U.S.* (1972) 405 U.S. 150, 153). The *Ruthford* court stated (at p. 408) that the "*suppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process.*"

The duty to disclose evidence bearing on the credibility of a prosecution witness includes any promises or inducements that have been made to obtain the witness's testimony. As the California Supreme Court explained in *People* v. *Phillips* (1985) 41 Cal.3d 29, 46, "*[S]ince a witness's credibility depends heavily on his motives for testifying, the prosecution must disclose to the defense and jury any inducements made to a prosection witness to testify and must also correct any false or misleading testimony by the witness relating to any inducements.*"

As the respondent points out in its Reply Brief (at pp. 13-16), the case of *People* v. *Morris* (1988) 46 Cal.3d 1, involved a fact situation where the defendant contended that he had been denied due process of law because of the alleged suppression of evidence of substantial leniency that had been given to a prosecution witness by the prosecution. In *Morris*, the California Supreme Court had

no difficulty finding a due process violation. The high court found that *"the evidence leaves no room for doubt that defendant was wrongfully deprived of material evidence bearing on the credibility of the prosection's key witness, Joe West."*

Based on the various Federal and State authorities cited above, the prosecutor, Mr. Stout, had the clear duty to disclose to petitioner's trial counsel the nature of the agreement in question that it had entered into with Copas and his counsel. The failure to make a full disclosure in that regard violated the petitioner's due process rights under the Fourteenth Amendment of the U.S. Constitution.

Petitioner argues that under Penal Code §1473, a habeas corpus petition should be deemed meritorious when a petitioner demonstrates that *"false evidence that [was] substantially material on the issue of guilt or punishment was introduced against [him] at any hearing or trial relating to his incarceration." (In re Hall (1981) 30 Cal.3d 408, 424.) (Emphasis added). Under (In re Wright (1978) 78 Cal.App.3d 788, 814).*

Petitioner contends that Copas' perjury regarding his heroin use would have affected the outcome of petitioner's trial for two reasons. First, had the jury known that Copas was using heroin at or near the time of his testimony, it would have found him unreliable. Can respondent reasonably argue that the jury might have accepted the testimony of a lifelong narcotics addict felon?

More importantly, the jury certainly could have rejected Copas' testimony had it known that he was lying about his drug use. In *People* v. *Randle* (1982) 130 Cal.App.3d 286, the court vacated a judgment when evidence offered in support of a new trial motion destroyed the credibility of the prosecutrix in a sex case:

> *The newly discovered evidence would render a different result probable on retrial of this case. The core of the*

> *disagreement is whether the sex act occurred with consent or force. The victim told her story and the appellant told his. The new evidence does more than merely impeach Susan--it tends to destroy her testimony by raising grave doubts about her veracity and credibility. Her credibility is central to the proof of the crime. (People v. Huskins, supra, 245 Cal.App.2d 859, 863.)*

Id. at 293.

In re United States v. *Wallach* (2d Cir. 1991) 935 F.2d 445, appellant was convicted of RICO and other federal crimes as a result of his involvement with Wedtech, a defense contractor. When evidence of perjury by the government's chief witness was unearthed after conviction, *Wallach* brought a motion for a new trial in the district court. The government argued, and the district court agreed, that evidence Guariglia lied was "*inconsequential because it was merely cumulative, providing one more basis for challenging [his] credibility.*"

On appeal the Second Circuit rejected the government's argument and reversed, stating that:

> *[A] witness's credibility could very well [be] a factor of central importance to the jury, indeed every bit as important as the factual elements of the crime itself." [citation omitted] . . . . Upon discovery of previous trial perjury by a government witness, the court should decide whether the jury probably would have altered its verdict if it had the opportunity to appraise the impact of the newly discovered evidence not only upon the factual elements of the government's case, but also upon the credibility of the government's witness. [citation omitted]*

Id.

Just as reversal was required in *Wallach*, the petitioner argues that the petition must be granted in this case.

VII

APPROPRIATE STANDARD OF REVIEW

The respondent contends that even if there was a violation of petitioner's constitutional right to due process and a fair trial, that such violation was harmless and did not affect the outcome of his trial.

The respondent argues that the appropriate standard review is whether any error "*had a substantial and injurious effect or influence in determining the jury's verdict.*" (See *Brecht* v. *Abrahamson* (1993) ___ U.S. ___; [123 L.Ed.2d 353]. The petitioner contends that the standard of review is still the standard applied in *Chapman* v. *California* (1967) 386 U.S. 18, 24 which requires that a conviction obtained at a trial which is marred by constitutional error be reversed unless the error is proven harmless beyond a reasonable doubt.

A review of the *Brecht* decision has caused this court to conclude that in the first instance, a state court must apply the *Chapman* standard to evaluate a claim of constitutional error. It is only after a state court has conducted the *Chapman* review and the losing party has had the opportunity to bring a petition for certiorari that the process of direct review ends; at that point, should the party bring a federal petition the federal court would be required to apply the "*substantial and injurious effect*" standard established by *Kotteakos* v. *U.S.* (1946) 328 U.S. 750.

In the case of *In re Jackson* (1992) 3 Cal.4th 578, the California Supreme Court reaffirmed that the standard of prejudice to be applied to *Brady* error situations is equivalent to the *Chapman* standard.

VIII

CONCLUSION

This court has reviewed and considered the pertinent parts of the trial transcript that was stipulated by counsel to be a part of the evidence in this matter. The prosection produced a lot of circumstantial evidence during the petitioner's trial that points toward his guilt of the charged offenses. However, the contents of the trial record make it clear that Ray Copas was the key witness for the prosecution. His credibility as a witness was a vital factor in the prosecution's case.

Had the jury been made aware of the facts regarding Copas which were discussed above that Mr. Stout failed to disclose to defense counsel or to the jury, the jury's assessment of the credibility of Mr. Copas could have been greatly affected. It is conceivable that different verdicts would have resulted. Mr. Stout conceded in his testimony that it might be the "kiss of death" if the jury had heard that Copas was being paid for his testimony with some sort of favorable treatment. (HT 63).

When the *Chapman* standard is applied to the facts in this case, this court cannot find beyond a reasonable doubt that the constitutional error that occurred during the petitioner's trial was harmless.

For the reasons stated herein, the petitioner's Petition For A Writ of Habeas Corpus must be granted which will vacate his conviction and he shall be granted a new trial.

Counsel for petitioner shall prepare a form of judgment consistent with the rulings contained herein and submit same to this court for signature, filing and entry.

Prior to signing any judgment that is submitted for signature by petitioner's counsel, this court will give the respondent an

opportunity to file a motion for a stay of execution of the judgment, pending the resolution of the anticipated appeal of this judgment by the respondent, pursuant to the provisions of Penal Code section 1506.

DATE: February 16, 1994 KENNETH G. ZIEBARTH
Judge of the Superior Court *Retired

*Sitting by assignment of the Chairperson of the Judicial Council.

JUDGMENT
Filed March 22, 1994

[Caption Omitted in Printing]

In accordance with the "Ruling on Petition for Writ of Habeas Corpus" filed on February 16, 1994, this Court issues a writ of habeas corpus vacating petitioner's convictions for murder and solicitation for murder in San Bernardino County Superior Court, Case No. OCR-10522, returned on January 20, 1986. Petitioner is to be delivered to the custody of the Sheriff of San Bernardino County for further proceedings in accordance with this judgment.

Petitioner is to be detained without bail pending the People's appeal of this court's decision. Petitioner may seek bail at a later date upon thirty days' notice to the People. Any bail proffered is to be held subject to a Penal Code section 1275 hearing.

Retrial of this matter is stayed pending resolution of the People's appeal. A status conference is set for Friday, September 23, 1994, at 1:30pm to check on the status of the appeal in this matter. (Penal Code section 1506.)

Dated: March 22, 1994

Honorable Kenneth Ziebarth
Judge of the Superior Court
(Retired)

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH DISTRICT, DIVISION TWO

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Appellant,

v.

JAITSEN JAINANDUN SINGH,
Defendant and Respondent.

OPINION
Filed August 15, 1995

APPEAL from a judgment of the Superior Court of San Bernardino County. Kenneth G. Ziebarth, Judge. (Retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council.) Reversed.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Keith I. Motley and Sara Gros-Cloren, Deputy Attorneys General, for Plaintiff and Appellant.

Riordan and Rosenthal, Dennis P. Riordan and Dylan L. Schaffer, under appointment by the Court of Appeal, for Defendant and Respondent.

The People appeal after the trial court granted the petition of Jaitsen Jainandun Singh for a writ of habeas corpus. Singh was convicted in 1986 of the 1983 murders of his wife and daughter. Singh was not the actual killer but was convicted on the theory that he had contracted for the murders by a person or persons unknown. Raymond Copas had testified for the prosecution in

December of 1985. Copas had testified that, eight months before the murders, Singh had solicited Copas to kill Singh's wife in a manner closely resembling the actual murders.

In 1992, Singh filed a petition for writ of habeas corpus based on an affidavit by Copas, in which Copas did not recant any of the substance of his trial testimony but alleged that he had lied at Singh's trial when he denied current use of heroin, and when he denied he had received any promises or benefits for his testimony against Singh. Singh sought a writ of habeas corpus on grounds that (1) the prosecutor did not inform Singh's attorney that benefits were provided to Copas, and (2) the prosecutor introduced false testimony at trial; i.e., Copas's alleged lies that he had not recently (as of Singh's trial date) used heroin.[1]

The trial court found that there was indeed an agreement to provide benefits to Copas for his cooperation in Singh's case, and that Copas "probably" testified falsely at trial that he was not then using heroin. The court found the failure to disclose the evidence, which could have been used to impeach Copas, was a violation of the prosecutor's duty to disclose evidence favorable to the defense (Brady v. Maryland (1963) 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194]), and a violation of Singh's right to due process. The court determined the violation was not harmless beyond a reasonable doubt (Chapman v. California (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824]) and granted the petition.

The People appeal, contending the evidence does not support the trial court's findings. Although we find the evidence adduced at the hearing is sufficient to support the court's finding of some agreement to benefit Copas as a result of his cooperation in Singh's case, we conclude that Singh failed to carry his burden to

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1. The petition for writ of habeas corpus also alleged Singh's trial counsel was incompetent and that instructional errors had deprived Singh of a fair trial, but the court's ruling below did not sustain either of these grounds.

prove the evidence was material. Moreover, the court improperly admitted Copas's declaration into evidence; in its absence there was no evidence to sustain a finding the prosecutor had introduced false evidence regarding Copas's heroin addiction. Accordingly, we reverse.

FACTS

I. The Singh Murder Trial

A. The Murders

In the late evening hours of August 27, 1983, Singh's wife's car was located, abandoned in a vacant lot in Los Angeles. Police discovered the dead bodies of Grace and Daphne Singh, Singh's wife and adopted stepdaughter, in the trunk. Grace and Daphne had been gagged, beaten, stabbed, and strangled with electrical cords. The electrical cord, which was found with the bodies, had been cut from a clock in the Singh home. The clock was stopped at 2:44. The attack resulting in the deaths had apparently taken place in the Singh house in Ontario.

B. Background

1. Singh's Marriage and Family. Singh was a Dutch citizen, born in Surinam of Indian parents. In 1967, while he was living in Holland, Singh met and married Grace. Singh testified that, at the time of his wedding to Grace, he signed a piece of paper by which, under Dutch law, he "automatically" adopted Grace's one-and-one-half-year-old daughter Daphne. Grace and Singh also had one child of the marriage, a son, Suren, who was born in Holland in 1969. By 1983 Singh had been married to Grace for approximately 16 years and had been living in the United States for some time.

2. The Insurance. In 1980, Singh bought life insurance policies on himself and Grace in the amount of $200,000, for the

stated purpose of covering the mortgage debt of the parties, which then stood at $225,000. About a year and a half later, Singh told his insurance agent he planned to trade his property for a larger, income-producing property, and to go into debt an additional $600,000 or $700,000. Singh applied for replacement policies in the amount of $1 million. The insurance company refused to issue such policies because Singh had not yet actually incurred any additional debt, but agreed to issue policies in the amount of $700,000. In fact, the property exchange deal never materialized, and at trial Singh could not name any realtors or other persons he had dealt with in trying to negotiate such an exchange. The insurance agent told Singh it would be wise to get $1 million in coverage because a rate break is provided at that level; Singh agreed, and the agent wrote an additional $300,000 coverage with another company. The policies were all in force by May 18, 1982. In 30 years of selling life insurance policies, the agent had sold only two $1 million policies before Singh's.

Grace had additional life insurance through her employment at the telephone company. Altogether, Grace had $1.2 million of insurance on her life.

Singh was a self-employed plumber. In 1980 when he applied for the initial $200,000 insurance policy, Singh wrote that he earned $24,000. Although he testified that he had earned $37,000 or $38,000 in 1982 from his plumbing business, he testified that he earned less than $10,000 in 1983. Nevertheless, Singh paid $200 per month or $2,400 per year for the insurance policies. Although Singh claimed he worked out of his house and carried his plumbing tools in his car, there were no records anywhere in the house dealing with a plumbing business.

Grace worked for the telephone company as a tester. Singh stated he did not know how much she earned. The initial life insurance application stated she earned $12,000.

Singh also owned some rental properties, assertedly valued at $285,000 to $325,000, which produced $2,400 in income per month. The initial application for life insurance in 1980 showed that the property income was $1,700. Singh testified the payments on the apartments were $1,335 per month. Singh had offered the apartments for sale or exchange at $265,000, but the property was tied up in litigation in 1981 or 1982 when some buyers claimed Singh had backed out of a sale.

3. Singh's Offer to Marry Maria Estrella. Sometime in early 1983, Singh told John Vasquez ("Johnny") that he no longer loved Grace. Singh asked Johnny to procure him a girlfriend, naming a specific woman, Maria Estrella, to whom Singh had particularly taken a fancy. Estrella had been a tenant in an apartment building owned by Singh, but she had been evicted for nonpayment of rent. Johnny knew she needed money; he testified that Singh also knew Estrella did not have any money. Singh told Johnny to tell Estrella that Singh was going to get a lot of money and would buy Estrella anything she wanted. Singh gave Johnny money to give to Estrella. Estrella did not want the money; Johnny did not tell Singh, but pocketed the money. Singh stated both to Johnny and in a note he wrote to Estrella that he loved Estrella, that he would divorce Grace, and that he would marry Estrella. Estrella apparently never talked to Singh about his proposition.

4. Singh's Attempts to Obtain Poison. Sometime in 1983, Singh went to Wendell Wixom and asked Wixom to "take somebody out for him." Wixom was the son of Grace's best friend. In the past Wixom had had an operation for a brain aneurysm. Wixom also had suffered several felony convictions, including a conviction for forging counterfeit money. Wixom testified he had crudely rebuffed Singh's overture, but Singh later returned asking Wixom to get some cyanide for Singh, ostensibly because Singh wanted to "take out" a South American political figure. Wixom stole some cyanide and gave it to Singh. Wixom later asked Singh to return the cyanide after Wixom's brother frightened Wixom by pointing out that "the f---ing idiot [Singh] could use it on his

family." Singh told Wixom he could not return the cyanide because, after he had tried it on a goat and it had not worked, Singh had then "flushed" the cyanide.

Wixom testified that, sometime later, Singh again approached him with a list of poisons. The list was written in Singh's handwriting on a piece of paper. The first several items of the list were identical to a list of poisons described in an article on poisons found in the encyclopedia in Singh's home. The first poison on the list, botulinis toxin, was marked with an X. Singh asked Wixom to obtain some of the botulinis toxin and, if he could not get any, to go right down the list. At the bottom of the list, Singh had written "tasteless, fast-acting, untraceable." Wixom did nothing in response to Singh's request.

5. Singh's Relationship with Martha Meza.

a. Singh's "Future" Plans. In June of 1983, Grace went to visit some of her relatives in Holland. Daphne and Suren accompanied her. While Grace was gone, Singh met Martha Meza and began a sexual relationship with her. On the first date, Singh began talking of his plans to "make a future" for himself and his son Suren with Meza and her children. Singh told Meza he would divorce his wife to marry her. Singh's plans did not include Daphne, who was not Singh's natural child. Singh spent all day nearly every day with Meza while Grace was away. Singh spent money freely on Meza and her children (e.g., Singh bought gifts for Meza and her children, paid their overdue rent, paid for Meza's utility bills, and so on), who were in severe financial difficulties. Singh promised to build Meza a house and reassured her that she would not have to worry about money any more.

When Grace and the children returned, Singh continued to see Meza on a daily basis. Singh introduced his son, Suren, to Meza's family. Singh continued to tell Meza that he was going to divorce Grace. Singh and Suren took several trips with Meza and her children, including an overnight camping trip to Arizona.

Singh admitted at trial that he had lied to Grace about this trip, telling her that he was going on a hunting trip alone with Suren.

b. The Gold Jewelry. While Grace had been in Holland, she had purchased $2,500 worth of almost-pure 22-karat gold jewelry, which had belonged to one of her deceased relatives. She brought the jewelry to the United States on her return. Singh showed Meza the jewelry on numerous occasions, and ultimately left it in Meza's possession, telling Meza that she could wear it and that it would become hers when she and Singh were married.

c. The Engagement. In August, Meza told Singh that, if he really loved her, he should propose to her. He did so. The next day, August 19, 1983, Singh, Meza, Meza's brother Danny and Danny's wife went to a jewelry store in Los Angeles, where Singh paid over $500 for an engagement and wedding ring set for Meza. They had a celebratory dinner in Chinatown that evening.

d. Singh's Conduct Before the Killings. During the next week, Singh became very tense, anxious and nervous. Singh told Meza that he was fed up with the situation at home, and that he and Grace were fighting constantly. He said he hated Grace and Daphne because they mistreated Suren. Singh wished Grace and Daphne were dead. In addition, Singh told Meza that Grace had said she wanted to divorce Singh. Singh was very angry because "he said he's not a loser, nobody walks out on him; if anything, he's a winner."

Singh also became angry when he found out that Meza had been showing off her engagement ring to another person. Singh was upset because he thought Grace might find out about Singh's and Meza's engagement, and he did not want Grace to know. Singh immediately followed with a statement that "I have ways of shutting people up or I know someone that can do it."

During the week after Singh bought the rings for Meza, he told Meza he was going to take Suren on a hunting trip that

Friday. On Friday, August 26, Singh told Meza he would see her on Sunday when he returned.

6. The "Hunting Trip". On Friday, August 26, 1983, Singh prepared to take Suren and John Fischer, one of Suren's friends, on a "hunting trip." They left the house at 2 a.m. on August 27, leaving Grace and Daphne sleeping on the bed in the master bedroom. Singh took all the guns from the house, including the pistol normally left for Grace and Daphne, and put them in his car.

Singh drove to the high desert. They stopped at Kramer Junction at 3 a.m. to eat. After that, they stopped beside the highway and rested for about an hour. They drove another short distance and stopped again to rest, waking at sunrise. They drove on some desert roads and finally arrived at Red Mountain where they got something to drink.

They did virtually no hunting on this trip. They alighted at one or two locations for short periods of time (20 minutes) to look for game but did not find any. Fischer remembered that he had fired his BB gun at some point, but Singh did not recall any shooting on this "hunting trip."

At 4 p.m. on Saturday, August 27, they reached Bakersfield; Singh decided to go home. On the way home, Singh stopped again to nap for half an hour. They then continued home. Singh said he noticed a noise coming from the wheel of the car and slowed down noticeably for the remainder of the journey. Fischer testified he heard no noise coming from the car.

7. Discovery of the "Burglary". Singh and Suren returned home after 9 p.m. on August 27, 1983. Singh activated the automatic garage door opener and drove into the garage. Grace's black Monte Carlo was not in the garage. Singh normally parked his car on the right side of the garage. Significantly, on this occasion Singh parked his car "kind of in the middle" of the

garage; it would have been "very tight" if not impossible for Grace to have parked her car in its usual spot on the left side of the garage.

Gary Dudley, a friend of Daphne's, came to the house to keep a date with Daphne. Dudley approached Singh and asked Singh if Daphne were home. Singh said he did not know but would check. Singh entered the house through a door leading from the garage. He went in only a few steps before he came back out, speaking excitedly, and saying that something was wrong. Dudley did not hear Singh call out to anyone in the house.

Singh took Suren and Dudley to the home of Albert Reshaw, Singh's next-door neighbor. Reshaw, a nine-year veteran police officer, testified that Singh had come to his door and exclaimed excitedly, "My house, they're gone." Reshaw went to investigate. He saw some books on the floor in the living room. Although the house looked "ransacked," the books appeared to be stacked rather than thrown about and care was taken by the "burglars" not to break anything. Also, many valuable items were untouched, an unusual circumstance in a burglary. In several hundred burglary investigations, Reshaw had never seen a case in which burglars took away the bodies of their victims, incidental to the burglary.

A bloody and damaged baseball bat lay in the hallway outside the master bedroom. There was damp blood on the bed in the master bedroom where Grace and Daphne had been left asleep.

As Reshaw sat with Singh waiting for the police to arrive, Singh insisted Suren was in danger. When Reshaw tried to find out why Singh thought that, Singh became very frustrated and smashed a glass dish on the kitchen table. Singh told Detective Racine that he had thrown the glass dish because he was angry that Grace and Daphne had gone without leaving a note, as they normally did when they left.

Police found no forced entry into the house. It appeared that nothing of value was disturbed or taken, except that Singh told police that the gold jewelry from Holland and $2,000 cash (that Grace kept in her purse as an "emergency fund") were missing. Throughout the investigation, Singh continued to maintain that theft of the gold jewelry and the $2,000 cash was the motive for the burglary. He so stated to various police officers on numerous occasions, to his neighbor, Albert Reshaw, and to the insurance agent. Singh never told police that Meza had the jewelry.

9. Singh's Conduct After the Killings. When Singh was informed that the bodies had been found, he asked Detective Racine if there was any way to identify the bodies without Singh having to look at them. Singh specifically stated he did not want to see the bodies.

Almost immediately after the bodies were discovered, Singh contacted his insurance agent to tell him of Grace's death.

Within a day or two, Singh took Meza to a motel room and had sex with her, explaining that this was "his way of mourning."

John Fischer testified that, sometime in September, Singh talked to him about the police. Singh told Fischer to "tell the truth" when the police asked them questions, but also urged Fischer to "remember that we saw him lock the garage door" leading into the house when they had left for the hunting trip. In fact, Fischer remembered that he did not see Singh lock the door.

10. Disappearance of the Gold Jewelry. Singh told Meza not to wear the gold jewelry Grace had brought from Holland; Singh said he had found out that his brother-in-law had told the police the jewelry was stolen, but Singh did not want to involve Meza. Later, Singh told Meza to throw the jewelry away, dump it in the ocean, or hide it because he was to be interviewed by the police and he wanted to be able to tell them honestly that he did not know where it was. Meza hid the gold jewelry in the freezer in her

brother's house (where she was living at the time). Singh had also moved in with Meza at her brother's house. At some later time, Meza told Singh where she had hidden the jewelry. She did not tell anyone else. At some point, Meza discovered that the gold jewelry was gone.

11. Raymond Copas. In January 1983, several months before the murders, Singh told Johnny Vasquez that he was looking for someone to "do a job." Johnny introduced Singh to Raymond Copas. Copas had a long criminal history and was well-known in Ontario as a heroin user. Singh met with Copas and told him that Singh would pay Copas $10,000 to kill someone. Singh told Copas he had some insurance money coming that would pay for the job.

Singh took Copas to his house. He told Copas he had already greased the hinges on the door so there would be no noise when Copas entered. Singh offered keys to the house and to Grace's black Monte Carlo. Singh told Copas the victim, a woman, would enter the garage from the house at 5 or 5:15 a.m. on her way to work. Singh instructed Copas to wait for her in the garage, to hit her over the head with a baseball bat "to silence her," to put her into the trunk of the Monte Carlo, to take the car to Palm Springs or Los Angeles and to abandon the car there. Singh also told Copas to go into the house and take things of value from the house and the victim's purse "to make it look like a robbery."

The next day, Singh called Copas and asked why he had not "done the job." Copas told Singh he would do it in his own time. Singh did not contact Copas any more; Copas assumed the "contract" was over. Copas did nothing.

About two months later, Singh asked Copas to beat up a man in Riverside. Singh promised to pay $1,500, but paid only $300 at first. Singh drove Copas to the man's house, Copas beat the man with a stick and returned to Singh's car. Singh and Copas drove away. Afterwards, Copas tried to contact Singh several times to get the balance of the promised money.

Copas was arrested on April 3, 1984, on a misdemeanor charge of being under the influence of heroin. Copas admitted to the arresting officer that he used heroin two or three times per week. At that time, some seven months after the killings, no arrests had been made for the Singh murders. While Copas was in custody, he asked to talk to Detective Carrillo of the Ontario Police Department. Carrillo interviewed Copas at the jail; Copas told Carrillo that he had information about the Singh murders and related the story that Singh had solicited him to kill his wife. Copas drew a diagram of Singh's house, describing the plan to murder Grace in the garage.

Shortly after Copas came forward, Singh was arrested for the murders.

12. Singh's Letter to Victor Vasquez. Asuncion ("Victor") Vasquez, Johnny Vasquez's brother, had worked for Singh for seven or eight months collecting rents from the tenants of Singh's apartment building and doing some gardening there. After Singh's arrest, Singh's attorney delivered a letter, written by Singh, to Victor. A second letter was enclosed in the same envelope, asking Victor's wife to read the letter to Victor, as Victor did not read English. The letter urged Victor to "remember" various statements or events involving Copas. The letters were written after Singh's arrest, but before the initial preliminary hearing. (The significance of the timing is that, before he testified at the preliminary hearing, Copas was identified in discoverable police reports only as a confidential informant, yet the letter demonstrates Singh's knowledge that Copas was the informant against him.)

Singh reminded Victor of an occasion in which Singh had thought of giving Copas a painting job on a construction repair project, and that Victor had warned Singh that Copas was a "dangerous man," and that Singh should have nothing to do with him. Singh wrote that, because he ultimately did not give the painting job to Copas, Copas had been trying to blackmail him ever since. Singh listed an example: that Copas had come to the

construction site, in a particular orange car, and had angrily threatened to tell Singh's wife that Singh had impregnated Maria Estrella. Singh also reminded Victor that Copas had threatened to kill Singh. Singh urged Victor to talk to Singh's lawyer and the defense investigator; "they are on our side and they are trying to help us." Singh reassured Victor that his brother Johnny "had nothing to do with this whole thing," and "besides that, when all this was happening, and when Grace and Daphne were killed, John was in Connecticut. He thought he had done me a big favor." After his wife read the letter to him, Victor took the letter to police.

At trial, Victor denied that he had told Singh that Copas was dangerous, denied that he had warned Singh against Copas, and denied that Copas had threatened to kill Singh. Although Copas had come around looking for Singh, and Copas had told Victor that Singh owed money to Copas, there was no evidence that Victor knew what the money was owed for (i.e., the "painting job" or something else).

13. Singh's Conversation with Jo Ellen Downs. Jo Ellen Downs lived on the same block as the Singh family. She also worked at the telephone company with Grace. After the murders, Singh visited Downs and asked whether the police had talked to her. Downs said yes. Singh told Downs that, if the police asked any questions about why Grace was so nervous just before her death, Downs should tell the police that Grace had been nervous about her health.

14. Additional Evidence

a. Unaccounted-for Key. Police investigated the murders on and after August 27, 1983. The investigating officers found no forced entry of Singh's house. A key found lying on the coffee table in the living room operated the front door lock and the deadbolt lock to the master bedroom. Singh could not account for whose key it was.

b. Singh's Diagram of the House. Police collected evidence from the crime scene, including a small notebook found in Singh's nightstand. In the notebook was a diagram of the floorplan of Singh's house. Arrows were drawn showing the path that would be taken by a person coming from the master bedroom into the garage. A rectangle drawn in the garage area was located in the position normally occupied by Grace's car. There was a mark near the portion of the rectangle consistent with the car's trunk, and another mark within the rectangle consistent with the location of the garage door opener in the glove box.

Singh admitted making the diagram but he could not give police any account of why he had made it. At trial, Singh testified that the diagram was a plan to remodel the house, moving the clothes washer, dryer, and water heater from the kitchen area to the garage. There were no notations on the diagram, however, referring to the washer, dryer or water heater. (Singh testified the house had burned down and been completely destroyed in 1978 and that Grace requested the modifications -- moving the washer, dryer and water heater -- to give her more room in the rebuilt house. He claimed to have made the diagram in 1979, before the house was rebuilt. In fact, the diagram duplicated the floor plan before the fire, including the original locations of the washer, dryer and water heater, and the appliances were not actually relocated when the house was rebuilt. Notably, Singh banked $20,000 of the $40,000 insurance money he collected for the destroyed house.)

Singh claimed that the rectangle in the garage represented a billiard table, and was intended to show plans to enclose the garage, making it into a den. Singh also testified, however, that Grace was very particular about her car, always parked it in the garage, and would not have wanted to give up the sheltered garage parking.

c. Singh's Explanation of the Poison List. Singh admitted that he had written the poison list and that much of it had been copied from an encyclopedia article on deadly poisons. Singh testified,

however, that he had written the list at Wixom's direction. Singh testified that Wixom once came to talk to Singh because Wixom discovered that Singh was from South America, where Wixom had often spent time. Singh had a "wide-ranging" discussion with Wixom about many topics. Singh claimed he had written several other pages for Wixom besides the list of poisons. For example, Singh testified he wrote several details about airplanes in connection with a scheme in which Singh was to act as pilot and fly Wixom to South America so that Wixom could exchange counterfeit United States currency for oil, drugs or precious gems. The conversation also included a discussion of the use of poisons in fishing and hunting in South America; Singh testified that Wixom seemed fascinated by the idea of using poisons to catch fish. Singh claimed he wrote the list of poisons at Wixom's request because "due to a illness in [Wixom's] brain, he had some problems seeing things, and at that time, he did not have his glasses, so he asked me to do it, and I did it."

Singh maintained that Wixom was lying about the origin of the poison list because Wixom was angry with Singh; Singh had once told Wixom that the federal government would not give someone with a criminal background, like Wixom, a passport. Wixom later confronted Singh and showed him that Wixom had managed to obtain a passport.

d. Copas's Alleged Threats Against Singh. Singh testified that, although he never actually offered the painting job to Copas, and did not talk to Copas about the painting job, Copas found out and was angry that Singh had selected another painter. Singh testified that Copas came to the job site, demanding money, and that Copas threatened to tell Singh's wife that Singh had had an affair with Maria Estrella. Singh testified that he was not concerned and was not afraid of Copas, and dared Copas to do his worst.

Although Victor assertedly told Singh that Copas had threatened to kill Singh, Singh did not fear Copas. Victor told

Singh that Copas was a killer and that he was dangerous, but Singh testified that he simply thought Copas "had a big mouth."

Singh also testified that, after the murders, Copas called Singh on the telephone, stating that "he knew that my wife and daughter were killed, that he was sorry, very sorry about it, to hear that, that he knew I had a son left and myself, and that he was interested in protecting us." Copas purportedly told Singh "[t]hat for the amount of $10,000, $5,000 for me, $5,000 for my son, he would make sure that nothing would happen to us." Copas also made veiled threats "that he knew where my son was going to school, where he was living, how he looked like." Singh claimed he told Copas to "go fly a kite, something to that extent," but that he was "a little bit" worried, but "[n]ot much though."

Singh never reported these threats to the police, and never suggested to police that they should investigate Copas in connection with the murders because "I did not think anything about it." In addition, although Singh testified that he was concerned for Suren's safety as a result of Copas's threats, and that that was the reason Singh sent Suren to Holland, he also testified that he did not move Suren from the place he was staying. In fact, Singh left Suren with a neighbor's family, across the street from the house where the murders took place, for several months after the murders. It was not until the night Singh was arrested that he moved Suren; Singh then arranged immediately for Suren to be flown to Holland. Law enforcement officers never had an opportunity to interview Suren after Singh's arrest.

e. The Gold Jewelry. Singh testified that, although he knew he had given at least some of the Holland jewelry to Martha Meza, and although he repeatedly told police the jewelry was missing after the burglary, he never told police that Meza had the jewelry because he "didn't want to get [Meza] involved in it." And, although Singh claimed the jewelry was his personal property purchased for investment (even though it had been purchased from the estate of one of Grace's relatives), he never asked Meza to

return the $2,500 gold jewelry because he "never thought about it anymore."

f. Singh's Marital Values. Singh's testimony indicated his attitudes toward marriage in general and his marriage to Grace in particular. At one point, Singh testified, "If you would call me a dog, . . . right now, . . . because I cheated on my wife, I wouldn't say anything to you because that's true. . . . I did it. It's there. It's a fact. [¶] However, if I had two wives, maybe you cannot understand because it's not your culture. In my culture, it's a normal thing. If I had 212 wives, maybe it would be the same effect. [¶] Let me explain something to you. It's not that you love somebody. What is love? I don't know the explanation of love the way you know it. But after 16 years of marriage, maybe I hated my wife. There are times you hate somebody. There are times you say, hey, I like you. . . ."

Singh testified that, under his culture, a man would be scorned if his wife divorced him or left him. It was acceptable under Singh's Indian culture for a man to have more than one wife, but not acceptable for a woman to have more than one husband. Singh did not consider it "cheating," in his mind, to have a relationship with another woman: "Wrong would be . . . if I would go outside the marriage and produce children and not marry that woman. That would be -- that's a classic example of what I would consider cheating."

Singh also explained his affair with Meza as something of a lark. Meza told Singh that, in the United States, "the first night you take a woman out, you feed her, or she mentioned something, dining, dining and wining, or I'm not familiar with that expression. The second night you go to bed with her." Singh bought dinner the first night and took Meza out the second night (and slept with her) just to see if what Meza had said was true. Singh also testified that, although he knew what an engagement ring was, he did not understand what it meant. He knew that a wedding ring "means you're married," he believed that an engagement ring "tells

you I'm not going to marry somebody else but only you," and he paid $575 for a wedding and engagement ring set for Meza, but he never had any intention of marrying Meza.

When asked why he would introduce Suren to his mistress, Singh said, "I never thought about it." Singh also "never thought about" the possibility that Suren would tell Grace that Singh was having an affair with Meza.

Within days after the deaths of Grace and Daphne, Singh had moved with Meza into Meza's brother's house. Singh left Suren with neighbors.

II. The Habeas Corpus Hearing

A. Copas's Declaration

Singh's petition for a writ of habeas corpus was based in the first instance on the declaration of Raymond Copas. Copas averred that, although he had testified at Singh's trial that he had formerly been a heroin addict 17 years before, that he still used heroin "occasionally," and that it had been several months before his trial testimony that he had last ingested heroin, he claimed that in fact he was a heroin addict at the time of trial and had actually used heroin on the two days he testified. Copas also averred that, although he testified at trial that he came forward solely because "[the] young girl wasn't supposed to die," and he denied receiving benefits for his trial testimony, "[i]n fact, at the time I testified I knew that an agreement had been reached between [the prosecutor] and my defense attorney to continue my sentencing on [pending felony charges of burglary] until after the conclusion of Mr. Singh's trial. It was my belief that in exchange for my testimony I would not be sentenced to any term of incarceration on either burglary charge, despite my long prior record." Thus, Copas now averred that he had lied at Singh's trial about these two impeachment matters, but he never recanted any of the substance of his trial testimony against Singh.

B. Copas's Charges

Copas, a long-time heroin addict with a lengthy record of felony and misdemeanor convictions, first came forward in Singh's case in April 1984, when he was arrested on a misdemeanor charge of being under the influence of heroin.

Copas gave a statement to police, corresponding to the evidence he gave at Singh's trial, in April 1984.

On April 7, 1984, Copas was again arrested on a misdemeanor theft charge.

Copas testified at a preliminary hearing on May 8, 1984, but Singh was not held to answer. A second preliminary hearing was held on March 20, 1985. This time, Singh was held to answer. Between the first and second preliminary hearings, in December of 1984, Copas was arrested for burglary. The charge was rejected for prosecution. Copas mistakenly testified at trial that he had pled guilty to the December 1984 burglary and "got three years" for that offense.

On February 5, 1985, two of Copas's misdemeanor charges were continued. Despite a stated policy that he would not be involved in any of Copas's cases, Stout made an appearance on that date. The stated reason for the continuance was that Copas was "a witness in Superior Court case for People."

On March 28, 1985, a few days after he testified at the second preliminary hearing, Copas was charged with burglary (stealing an appliance from a newly constructed home). He used a ruse to bring Detective Underhill to the jail; Copas asked to be released on the burglary case. Underhill did nothing to gain Copas's release.

On May 15, 1985, Copas was stabbed in the county jail with a "shank." On that date, deputy district attorney Stout appeared

in court and asked for an OR release for Copas. No defense counsel was present. Stout admitted that he had never appeared to ask for release for any other inmate who had been stabbed in the county jail.

Copas's felony and misdemeanor charges were continued until August 1985. In August, Copas made an "open" guilty plea to the felony burglary and six misdemeanor charges were dismissed. Sentencing was continued to September 1985, although Copas was told he could receive up to three years in prison for the burglary offense.

In September 1985, Copas's felony sentencing was again continued, ostensibly because no probation report had been made (Copas failed to show up for his appointment with the probation officer). Copas's deputy public defender noted in her file that she had had a conversation with deputy district attorney Stout and that "something will be done" for Copas after the Singh trial and that Copas's case should be continued until Singh's trial was over. Stout also told the deputy public defender, however, that he was "not going to promise [Copas] anything because it wouldn't be appropriate at this point in time."

In December 1985, about two weeks before he testified at Singh's trial, Copas was again arrested for burglary (stealing chrome auto parts). Both the April 1985 burglary charges and the December 1985 burglary charges were continued until after the conclusion of the Singh trial. Copas pleaded guilty to the December 1985 burglary in February 1986. Copas was given probation for both burglaries. The sentencing judge approved the plea bargain, remarking that Copas had recently testified "in another case that concluded recently and [the Court] feels that this is commendable and therefore justifies any leniency that this plea bargain represents."

C. Additional Evidence

The court held an evidentiary hearing. In addition to the evidence already outlined, above, in connection with Copas's offenses, the evidence showed that Copas and his family had been placed for a time in a witness protection program before Singh's trial. (Copas testified at the trial that his family, but not he, had been afforded protection.)

Stout did not inform Singh's trial counsel of several of the above-described events.

D. Trial Court's Ruling

The court admitted Copas's declaration at the evidentiary hearing. Based on the declaration, and the other evidence submitted at the hearing, the court found that (1) Copas did actually receive beneficial treatment (continuance of his felony cases until after Singh's trial; probationary sentence on two felony burglaries after Singh's trial), (2) credible evidence supported the contention that deputy district attorney Stout had entered into an oral agreement with Copas to exchange benefits for testimony, and (3) Copas's trial testimony that he had not used heroin before trial was "probably false," Stout should have known that Copas was still an addict, and Stout breached his duty to inform defense counsel of such "apparent perjury."

Accordingly, the court found that Stout had breached his duty under Brady v. Maryland, supra, 373 U.S. 83 [10 L.Ed.2d 215, 83 S.Ct. 1194] to disclose all evidence favorable to the accused. The court further found that the state had failed to prove that the Brady error was harmless beyond a reasonable doubt. The court therefore granted the writ and ordered a new trial.

DISCUSSION

I. Admissibility of Copas's 1991 Declaration

The court below admitted Copas's declaration into evidence, in lieu of testimony and cross-examination, as a statement against Copas's penal interest.

The declaration was hearsay and was not admissible unless it came within an exception to the hearsay rule. Evidence Code section 1230 provides that a hearsay statement may be admissible "if the declarant is unavailable as a witness" and the statement ". . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." Thus, the proponent must show that the declarant was unavailable, and the statement was against the declarant's penal interest; i.e., whether the statement is sufficiently trustworthy to warrant admitting it. (See People v. Frierson (1991) 53 Cal.3d 730, 745.)

Here, Copas intended to claim the Fifth Amendment privilege if called to testify at the hearing. He was unavailable. (See People v. Leach (1975) 15 Cal.3d 419, 438.)

The declaration was not, however, against Copas's penal interest. Copas executed the declaration in 1991, over three years after his 1985 testimony. The statute of limitations for perjury is three years. (Pen. Code, § 801.) Because the court found that prosecutor Stout knew or should have known of the "perjury" when Copas testified in 1985, the statute had long since run on the "perjury."

In any event, the circumstances did not show the declaration was sufficiently trustworthy to be admissible. Copas "confessed" to "lying" about collateral matters in a trial six years earlier. The "confession" of alleged "perjury" cost Copas nothing; there was no reason to believe a career criminal like Copas would believe he

would be really be prosecuted for such an offense or, even if he were, whether he would balk at the prospect. In short, the circumstances do not demonstrate that "a reasonable man in [Copas's] position [i.e., a chronic jailbird with reason to curry favor with fellow-inmate Singh] would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.)

The declaration should not have been admitted.

In the absence of the declaration, there was no evidence to sustain the sole finding of false testimony; i.e., that Copas had lied when he denied he used heroin recently before his trial testimony. Even if burglary is a crime "typically" committed by drug addicts, the mere fact that Copas was charged with burglary a few days before his trial testimony does nothing to "prove" Copas was then using heroin. Copas denied being an addict any longer, although he admitted he still used heroin "occasionally." This subjective perception cannot be the basis of a "perjury" charge and does not amount to "false testimony." Moreover, because the defense thoroughly impeached Copas at trial on this point (the officer who arrested Copas in April of 1984 testified that Copas admitted regular heroin use), prosecutor Stout was not required also to inform Singh's counsel of what counsel obviously already knew.

Copas's declaration was not the sole evidence, however, of an apparent promise of benefits to Copas in exchange for his testimony. Leaving aside the declaration, we now examine the trial court's finding with respect to benefits.

II. Agreement for Benefits

A. Substantial Evidence of an Agreement

The People contend the trial court's finding of an oral agreement to provide benefits to Copas was not supported by the evidence.

The evidence was sufficient to support the trial court's finding. There was evidence which indicated Stout personally (Feb. 15, 1985) acquiesced in continuing some of Copas's misdemeanor cases because he was a witness for the People; Stout personally appeared on May 15, 1985, to ask for an OR release for Copas, something he had never done before for any inmate; both Copas and his family received witness protection benefits; Copas lured Detective Underhill to the jail and asked for release following his burglary arrest in March 1985; although Stout professed a policy of non-involvement in Copas's cases, Stout was the deputy who spoke to the probation officer preparing the sentencing report on Copas's March 1985 burglary and who suggested that Copas might be killed if he were sent to state prison; as well as the deputy public defender's file note that Stout had told her "something will be done" for Copas after the Singh trial. All the witnesses agreed that a probationary sentence of local time was unusually lenient punishment for two felonies (one committed while on bail from the other) committed by a career criminal like Copas. The evidence supports the finding of some agreement to provide beneficial treatment.

III. Disclosure of "Favorable" and "Material" Evidence

"The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant. (See, e.g., United States v. Bagley (1985) 473 U.S. 667, 674-678 [87 L.Ed.2d 481, 488-492, 105 S.Ct. 3375] . . . .) [¶] But such evidence must be both favorable to the defendant and material on either guilt or punishment. [Citation.] [¶] Evidence is 'favorable' if it either helps the defendant or hurts the prosecution, as by impeaching one of its witnesses. [Citation.] [¶] Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different.' [Citations.] 'The requisite 'reasonable probability' is a probability sufficient to 'undermine[] confidence in the outcome' on the part of the reviewing court. . . . [¶] Thus, to merit relief on this basis, the prisoner must show both the

favorableness and the materiality of any evidence not disclosed by the prosecution, as defined above. [Citation.]" (In re Sassounian (1995) 9 Cal.4th 535, 543-545, fns. omitted.)

Applying these principles here, we conclude there is no reasonable probability the result would have been different had the evidence of benefits been disclosed to the defense. Singh's case thus founders on the issue of materiality.

The evidence against Singh was crushing. Singh's motive (the unjustifiably high insurance policies), his affairs with and offers to marry other women (with the stated expectation that he would come into money soon, while he did not appear to be working), his lies about the Holland gold jewelry, the peculiar "hunting" trip, his attempts to sway witnesses, his attempts to procure poison, the blueprint for the murder (floorplan) found in his nightstand, and his outlandish "explanations" for these phenomena are incomprehensible unless Singh was involved in the murders. Even if Copas had been "further impeach[ed]" (In re Sassounian, supra, 9 Cal.4th 535, 550), our confidence in the outcome is not undermined.

It should also be remembered that, had Singh introduced further evidence impeaching Copas, the prosecutor would have been allowed to rehabilitate Copas with prior consistent statements. (Evid. Code, ¶ 791, subd. (b); People v. Andrews (1989) 49 Cal.3d 200, 210.) Although there was evidence that suggested benefits were provided to Copas concerning his felony burglary charges (both arising in 1985) and in continuing some of his misdemeanor cases (in 1985), Copas also made prior consistent statements in his initial interview with police in April of 1984 and at the first preliminary hearing in May of 1984.

Moreover, and unlike Sassounian, Copas himself never repudiated the substance of his trial testimony against Singh. The additional evidence went solely to the collateral issue of credibility, and not to the substance of the testimony.

We conclude that Singh failed to carry his burden of proof regarding the nondisclosure of "favorable" and "material" evidence.

DISPOSITION

The judgment granting the writ of habeas corpus is reversed.

NOT FOR PUBLICATION

Dabney, J.

We concur:

Ramirez, P. J.

McDaniel, J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE CENTRAL DISTRICT OF CALIFORNIA

JAITSEN J. SINGH,
Petitioner,

v.

K.W. PRUNTY, ET AL.,
Respondents.

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE
Filed July 23, 1996

This Report and Recommendation is submitted to the Honorable Robert Timlin, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends the Petition be denied and dismissed with prejudice.

I. PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus by a Person in State Custody" on February 20, 1996 ("Pet.").[1] Respondents filed a Return on April 23, 1996 ("Ret."). Petitioner

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1. Respondents contend the Petition should be dismissed because it is not signed by Petitioner. (Ret. at 53.) On June 5, 1996, Petitioner filed a "Verification by Declaration of Jaitsen Singh in Support of Petition for a Writ of Habeas Corpus." Thus, the Petition should not be dismissed for Petitioner's failure to sign. See Lucky v. Calderon, 86 F.3d 923, 925-26 (9th Cir. 1996).

filed a Traverse on May 28, 1996. On June 11, 1996, Respondents filed a Supplemental Return, addressing the impact of the Antiterrorism and Effective Death Penalty Act, signed into law on April 24, 1996. Petitioner filed a Supplemental Traverse on July 1, 1996.

II. BACKGROUND

A. THE MURDERS

Sometime in the early morning hours of August 28, 1983, Los Angeles police were alerted to the discovery of the car belonging to Petitioner's wife, apparently abandoned in a high-crime area of Los Angeles. (Reporter's Transcript ("RT") 2180; 2889; 3007-12.) In the trunk of the car, police found the bodies of Petitioner's wife, Grace, and stepdaughter, Daphne. (RT 2890; 3507.)

B. PETITIONER'S FAMILY HISTORY

Petitioner, a Dutch citizen, met Grace in the Netherlands in 1967. (RT 3207-08.) Sometime thereafter, the two married. (RT 3208.) Under Dutch law, Petitioner "automatically" adopted his stepdaughter upon his marriage to Grace. (RT 3209.) Suren Singh is the son born to Petitioner and Grace. (RT 3209-10.)

C. INCRIMINATING EVIDENCE AT PETITIONER'S TRIAL

1. THE INSURANCE

Petitioner had mortgages totaling approximately $225,000 on various properties. (RT 2094.) To cover this debt in the event either Petitioner or Grace died, the couple took out a $200,000 life insurance policy. (RT 2069.) In early 1982, Petitioner told his insurance agent he intended to acquire additional debt, totaling $600,000 to one million dollars, in order to acquire larger income producing property. (RT 3662.) Petitioner and Grace applied for life insurance totaling one million dollars. (RT 2085; 3669-70.) In

the previous thirty years, the agent had sold only two other million dollar life insurance policies. (RT 2096-97.) The insurance company rejected the application because the additional debt had not yet been acquired. (RT 2085.) Instead, the insurance company issued a new life insurance policy in the amount of $700,000. (RT 2085.) The insurance agent thereafter acquired an additional $300,000 in life insurance for Petitioner and Grace from a different insurance company. (RT 2087.) During this time, Grace also acquired $194,000 of life insurance coverage through her employer. (RT 2092-94.)

Petitioner never acquired larger rental property. (RT 3672.) At trial, Petitioner could not name any real estate agents or sellers or buyers he contacted during his purported property acquisition. (RT 3672-73.)

With the new insurance policies, Petitioner and Grace were paying over $200 a month for approximately 1.2 million dollars in life insurance. (RT 3673; see 3675-76.) During 1983, Petitioner earned wages of less than $10,000. (RT 3620.) Although Petitioner testified he did not know how much Grace earned, insurance forms revealed she earned approximately $12,000-$15,000. (RT 2073; 2095; 3213.)

Petitioner stated he and his insurance agent had a strictly business relationship. (RT 3677.) Petitioner contacted his life insurance agent the day after the murders and met him in a parking lot. (RT 2102-05; 3677.) At trial, Petitioner testified he did not ask his insurance agent to submit insurance claims on Grace that day. (RT 3679.) According to the insurance agent, however, the two discussed Petitioner's grief and the insurance claims. (RT 2111-12.)

Prior to Petitioner's arrest, Petitioner signed a Power of Attorney in favor of the insurance agent. (RT 2098.) The Power of Attorney was designed to allow the agent to manage Petitioner's apartment buildings in Petitioner's absence. (RT 2099-2100.)

2. MARIA ESTRELLA

Petitioner asked Johnny Vasquez, an acquaintance of Petitioner, to do certain favors for him. (RT 1543-45; 1550.) Maria Estrella was one of Petitioner's former tenants. (RT 1612.) Petitioner gave Johnny some money to give to Estrella. (RT 1550.) Petitioner told Johnny to tell Estrella that Petitioner was about to get a lot of money and would buy her anything she wanted. (RT 1619.) He also told Johnny he wanted to marry Estrella and that he was unhappy with Grace. (RT 1546; 1614-16.)

3. THE POISON

Petitioner approached Wendell Wixom and asked him to "take somebody out for him." (RT 2225.) Wixom declined the offer. (RT 2226.)

Petitioner then asked Wixom to obtain cyanide for him. (RT 2226.) Wixom did so and gave it to Petitioner. (RT 2226-27.) Wixom changed his mind about giving the poison to Petitioner after Wixom's brother told him Petitioner might use the poison on Petitioner's family. (RT 2251.) Wixom then asked Petitioner to return the cyanide to him. (RT 2227.) Petitioner told Wixom he had tried the cyanide on a goat and when it did not work, he had flushed it. (RT 2227.)

Petitioner later approached Wixom with a list of poisons. (RT 2228.) Petitioner asked Wixom to obtain the first poison on the list, Botulinus toxin, and said if Wixom could not get it, to get another poison on the list. (RT 2229.) At the bottom of the list Petitioner had written "tasteless, fast acting, untraceable." (RT 2229-30.) After a handwriting expert opined the poison list was written by Petitioner, Petitioner admitted he had written the list. (RT 2813; 3768.)

4. MARTHA MEZA

In June 1983, while Grace, Daphne and Suren were in the Netherlands, Petitioner met Martha Meza. (RT 1902-06; 3298.) On his first date with Meza, Petitioner told her he wanted to make a future with her, her children and Suren. (RT 1905-06; 1912.)

Petitioner told Meza he would buy her a house and she would not have to worry about money. (RT 1906.) From the time they met, Meza and Petitioner spent almost all their time together. (RT 1911; 3305-06.) Although Petitioner told Meza he owned his own plumbing business, Meza never was aware of Petitioner going to work. (RT 1918.)

When Petitioner's family returned from the Netherlands, Petitioner introduced Suren to Meza. (RT 1914; 3713.) Soon thereafter, Petitioner and Suren took several trips with Meza and her children. (RT 1915-16.) Petitioner did not consider whether Suren would speak to Grace about Meza's and Petitioner's relationship. (RT 3714.)

On August 19, 1983, one week before the murders, Petitioner purchased an engagement and wedding ring set for Meza. (RT 1921-22; 3307-09.) Meza's brother and sister-in-law accompanied Petitioner and Meza to the jewelry store. (RT 1921; 4140.) After the purchase, all four went out for dinner. (RT 1921; 3310.) Petitioner asked Meza's brother to be the best man at the wedding. (RT 4140-41.)

After Petitioner purchased the rings, Meza showed them to someone. (RT 1931.) Petitioner became upset when he found out about this because he was afraid Grace would discover he was engaged to Meza. (RT 1931.) Petitioner then told Meza that, in any event, "I have ways of shutting people up or I know someone that can do it." (RT 1932.)

The week before the murders Petitioner became tense, anxious and nervous. (RT 1923.) Petitioner told Meza he wanted Grace and Daphne dead. (RT 1924.) Petitioner also told Meza that Grace had informed him she wanted a divorce, to which Petitioner reacted by telling Meza "[I'm] not a loser, nobody walks out on [me]; if anything, [I'm] a winner." (RT 1928-29.)

A day after the bodies of Grace and Daphne were discovered, Meza and Petitioner went to a motel room and had sexual intercourse. (RT 1937-38.) Petitioner told Meza it was his way of mourning. (RT 1938.)

While in the Netherlands, Grace paid $2,500 to purchase some 22 karat gold jewelry from a family member ("the gold jewelry"). (RT 3050; 3315-16; 3322-23.) Petitioner showed the gold jewelry to Meza and told her she could hold on to it. (RT 1934; 3322.) Petitioner told her the jewelry would be hers after she and Petitioner married. (RT 1935.)

Prior to Petitioner's arrest, Petitioner also told Meza to get rid of or dispose of the gold jewelry because he did not want Meza to be involved with the murders. (RT 1939.)

5. THE LABOR AND MATERIALS BOOK

In the nightstand of the master bedroom in Petitioner's residence, police found a notebook labeled "Labor & Materials" containing a diagram of Petitioner's residence. (RT 2915.) The diagram showed the floor plan of Petitioner's residence with X's, lines and rectangles drawn on it. (RT 2915-16; 3541-58.) The diagram appeared to show the paths into Petitioner's residence and into the garage. (RT 3551-52.) There was a box in the area representing where Grace normally would park her car and an arrow pointing toward the area where the trunk of Grace's car would be. (RT 3547-58; 3584-90.) The diagram had an X in the area where the glove box of Grace's car would be. (RT 3584-85.)

6. THE "HUNTING" TRIP

At 2:00 a.m. on Saturday, August 27, 1983, the day of the murders, Petitioner, Suren and one of Suren's friends, John Fischer, left Petitioner's residence ostensibly to go hunting. (RT 3730-31.) The friend Suren originally had invited could not go on the hunting trip after all, so at 9:30 p.m. on August 26, Suren invited Fischer to go with them. (RT 1704.) Petitioner took all of his guns with him on the trip, including a .22 caliber Beretta he normally left in the house for Grace. (RT 2886; 2937; 3460.)

The three made their first stop at Four Corners in San Bernardino around 3:00 a.m. to eat. (RT 1718; 3731-32.) A little later they stopped on the highway to rest. (RT 1719.) After driving another short distance, they stopped again to rest. (RT 1720; 3733.) This start and stop pattern continued until they reached their destination somewhere in Bakersfield at about 4:00 p.m on August 27. (RT 1728.)

On the way home, the three stopped again to rest. (RT 1729.) After continuing, Petitioner purportedly heard a noise coming from the car and slowed down for the remainder of the drive home. (RT 3739.) Fischer testified he did not hear any noise. (RT 1729.)

No hunting took place on the trip. (RT 3737.) Petitioner stated they once saw some quail but did not shoot at them. (RT 3737-38.) Fischer shot his BB gun out the car window once. (RT 1721-22.)

7. THE "BURGLARY"

At approximately 9:30 p.m. on August 27, 1983, Petitioner and Suren returned from the "hunting" trip and noticed Grace's car was not at the residence. (RT 1769-70; 3489.) Petitioner parked his car in the center of the garage, making it virtually impossible for

another car to fit in the garage. (RT 1571-72; 1775-76; 2167.)[2] As Petitioner was unloading his car, a friend of Daphne's named Gary Dudley showed up and asked Petitioner whether Daphne was home. (RT 3490.) Petitioner went inside the residence. (RT 3491; 3500.) Petitioner testified he took a few steps into the residence. (RT 3491-3500.) Dudley, however, never lost sight of Petitioner after Petitioner opened the door from the garage into the residence. (RT 1771.) From this vantage point, Petitioner testified he could see books stacked on the floor. (RT 3499-3501.) Petitioner had a feeling something was very wrong and ran next door to Albert Reshaw's residence. (RT 3501-02.) At that time, Reshaw was a police officer for the City of Montclair. (RT 1565.) According to Reshaw, Petitioner knocked on his door and exclaimed, "[m]y house, they're gone." (RT 1562.)

Although a window screen was bent, police determined there had been no forced entry into the house. (RT 2265-73.) On the coffee table, police found a key, which opened the door from the garage into the residence and the master bedroom. (RT 2263-65.)[3] Petitioner could not account for this key. (RT 2935.) In the hallway, a baseball bat with dried blood on it was found. (RT 1569.) Police also found two pools of blood on the master bedroom bed. (RT 1569.) The clock in the master bedroom had stopped at 2:44 a.m. (RT 2421.) The cord from the clock had been cut off and was used to strangle the victims. (RT 391-92; 2205; 2421; 2849-56; 2890-91.)

Petitioner told police $4,000 in cash and the gold jewelry had been taken from Grace's purse. (RT 2394-95; 3509-11.)

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2. Grace normally parked her car on the left side of the garage. (RT 1572.)

3. Petitioner testified he put the deadbolt lock on the master bedroom door only a few weeks before the murders, while Grace was in the Netherlands. (RT 3729.)

8. THE GOLD JEWELRY

Petitioner repeatedly told police and his insurance agent that the gold jewelry was missing after the burglary. (RT 2115, 2957; 2977; 3015, 3055; 3693.) Petitioner informed the police, and he reasserted at trial, that he could not describe the jewelry because he did not know very much about jewelry. (RT 3015; 3320-21.) Petitioner never told the police that Meza, and not Grace, had possession of the jewelry before the murders. (RT 2328; 2893-94; 3016; 3693-94.) Petitioner never told police Meza had any of the gold jewelry because he did not want Meza to be involved. (RT 3694.)

After the murders, Petitioner asked Meza to get rid of the jewelry because Petitioner had an interview with police and he did not want to know where the jewelry was located. (RT 1939.) Meza put the jewelry in the freezer at her brother's residence. (RT 1940.) At some point, Meza told Petitioner where the jewelry was located. (RT 1940.) Soon after, Meza found the jewelry gone. (RT 1940.) Petitioner and Meza were the only ones who knew where the jewelry was hidden. (RT 1961.)

9. PETITIONER'S CONTACT WITH WITNESSES

a. Victor Vasquez

After Petitioner's arrest, Petitioner's attorney delivered an envelope to Victor Vasquez, Johnny's brother and an employee of Petitioner's. (RT 2036; 3534-35.) Victor's wife read the letter contained in the envelope to Victor. (RT 2036-37.)

The letter asked Victor Vasquez to "tell them everything you know" about certain events regarding Raymond Copas, the informant who was to testify against Petitioner. (RT 3634.) The letter asked Victor to "remember" that Victor had told Petitioner Copas was a "dangerous man," and that Petitioner should have nothing to do with him. (RT 3536-37; 3631.) The letter asked

Victor to "remember" Copas was trying to blackmail Petitioner because Petitioner did not give Copas a painting job. (RT 3632; 3637.) The letter "reminded" Victor that Copas had threatened to kill Petitioner. (RT 3634.) Petitioner also reassured Victor in the letter that Victor's brother, Johnny, "had nothing to do with this whole thing." (RT 3635.)

The letter was written after Petitioner's arrest on April 10, 1984, but before the preliminary hearing on May 8, 1984. (RT 3034-35; 3535; Reporter's Transcript of First Preliminary Hearing at 1.) Until the preliminary hearing, officers only had referred to Copas as the "confidential informant," and not by his name. (RT 2878-79; 3023.) Petitioner, however, knew the identity of the "informant" as Copas as early as May 2, 1984, six days before the preliminary hearing. (RT 2038; 3034-35.)

At trial, Victor testified he never told Petitioner Copas was dangerous and never knew Copas had threatened to kill Petitioner. (RT 2817-19; 2040.)

b. John Fischer

Fischer testified that, after the murders, Petitioner contacted him and urged him to "remember that [he] saw [Petitioner] lock the garage door" leading into the house, prior to leaving for the hunting trip. (RT 1735.) Fischer testified he did not see Petitioner lock the door leading into the house from the garage. (RT 1736.)

c. Jo Ellen Downs

Jo Ellen Downs worked with Grace at the telephone company. (RT 2398.) After the murders, Petitioner visited Downs and told her that if the police asked her any questions about why Grace was so nervous just before the murders, Downs should tell them Grace was nervous about her health. (RT 2406-07.)

10. RAYMOND COPAS

a. The Substance of Copas' Testimony

Raymond Copas testified that in January 1983, Johnny Vasquez introduced him to Petitioner because Petitioner "wanted a job done." (RT 1783; 1794.) Copas testified Petitioner wanted him to kill someone. (RT 1800.)

According to Copas, he and Petitioner planned a murder which was to take place at Petitioner's residence the next day; Petitioner gave Copas a key to Petitioner's residence. (RT 1805.) Petitioner instructed Copas to hide in the garage behind the door and wait for Grace to leave for work, at approximately 5:00-5:15 a.m. (RT 180607.) Copas was to hit Grace over the head with a baseball bat and put her body in the trunk of the car. (RT 1806-07.) Copas then was to take things from Grace's purse "to make it look like a robbery." (RT 1805-09.) Petitioner wanted Copas to be sure to use the garage door device to close the garage door. (RT 1807-08.) Petitioner told Copas to drive Grace's car, with her body in the trunk, to Los Angeles or Palm Springs. (RT 1808; 2876.) Petitioner told Copas he would pay him $10,000 out of the insurance money he received after the murder. (RT 1810; 1822.)

The next day, when Copas had not committed the murder, Petitioner called and asked why Copas had not "done the job." (RT 1810.) Copas told Petitioner he would do it on his own time. (RT 1810-11.) When Petitioner did not contact Copas again, Copas assumed the murder contract was over. (RT 1811.)

At trial, Copas accurately described the interior and exterior of Petitioner's residence. (RT 1824; 1875-81.) Copas also had made these accurate descriptions to police officers during their first interview with Copas on April 5, 1984. (RT 1824-27; 3033-34.) At that time, Copas also told the officers Grace kept her garage door opener in her glove box. (RT 2876.)

b. Newspaper Accounts Of Murder

Robert Wagner, a local reporter covering Petitioner's case, testified at trial. (RT 4122-34.) Wagner stated that, to his knowledge, up until the time of the preliminary hearing on May 8, 1984, nothing had been mentioned in the press concerning the time Grace went to work. (RT 4131; Reporter's Transcript of Preliminary hearing at 1.) Further, Wagner testified that until the preliminary hearing, nothing had been mentioned in the press about Petitioner's residence having a Genie garage door opener. (RT 4131.) Wagner also stated the first time he became aware that insurance money might be involved in the case was at the preliminary hearing. (RT 4131.)

c. Copas' Other Dealing with Petitioner

Copas did another "job" for Petitioner. (RT 1828.) Sometime after the murder contract had been repudiated, Petitioner took Copas to a man's residence. (RT 1828; 1830.) While at the residence, Copas beat the man up for Petitioner. (RT 1828.) Copas understood the victim to be the friend of a woman Petitioner admired. (RT 1830.) Petitioner received approximately $300 from Petitioner for this "job." (RT 1828.)

d. Copas' Stabbing While in Jail

While in jail, before the preliminary hearing in which Copas testified as an informant, someone stabbed Copas. (RT 1830; 1847; Reporter's Transcript of First Preliminary Hearing at 1.) Copas testified he did not want to comment on who actually stabbed him, but that he believed Petitioner had put a contract out on him. (RT 1846-53; 1899.)

e. Copas' Criminal History and Drug Use

Copas admitted using drugs in the past and of having multiple felony and misdemeanor convictions. (RT 1830-38; 1841-45; 1847.)

When attempting to recount his current charges, however, Copas was unclear as to whether he had any pending cases. (RT 1841-42.) At one point, Copas claimed he had a case pending, but had pled guilty and received three years in state prison. (RT 1841.) Later, Copas testified he had not yet been sentenced for the current charge, but that his sentencing had been continued until January 3, 1986. (RT 1842.) Later still, Copas stated he thought he had two pending cases. (RT 1843.)

When asked if he currently was under the influence of heroin, or any other narcotic, Copas stated he was not. (RT 1834.) Copas could not remember the last time he had used heroin, but stated it was "quite a while ago." (RT 1834-35.)

f. Why Copas Approached Officers Regarding the Murders Solicitation

During Copas' direct examination, the following colloquy took place:

Prosecutor: Okay. When you came forward, why did you come forward to the police?

Copas: Because this young girl wasn't supposed to die.

Prosecutor: Did that bother you?

Copas: Yes, it did.

Prosecutor: As far as the woman dying, if only the woman had been killed, would you have come forward?

Copas: I don't think so.

Prosecutor: Why is that?

Copas: I guess she lived her life already. That young girl wasn't supposed to die. (RT 1813-14)

. . .

Prosecutor: Mr. Copas, the last time that you were here yesterday on the stand, you indicated that one of the reasons you came forward is because you felt it was wrong that the girl had died; is that correct?

Copas: That's correct. (RT 1818.)

. . .

Prosecutor: Now, at the time you contacted the police about this, you were in jail, weren't you?

Copas: No. I was out. I believe I was out.

Prosecutor: Are you sure?

Copas: No. That's right. I was in jail. I was in jail then.

Prosecutor: How did you contact the police?

Copas: Umm, I was awaiting to go to a preliminary hearing. It bothered my conscience constantly behind [sic] that little girl dying, and I asked one of the sheriffs if I could talk to one of the detectives.

Prosecutor: Did one of the detectives come to talk to you from Ontario?

Copas: Yes. (RT 1823.)

Copas then stated that Officers Carrillo and Underhill came to the jail and spoke with him. (RT 1823.)

At trial, Officer Carrillo testified that he spoke with Copas in jail about the murders. (RT 2859-60.) Officer Carrillo was asked if Copas "in any way attempt[ed] to cut a deal with [Officer Carrillo] about his case that he was in custody for." (RT 2860.) Officer Carrillo replied that Copas did not. (RT 2860.) Officer Carrillo also was asked if Copas attempted to cut a deal with the officer "with regard to any trouble that he might have been in at that time." (RT 2860.) Officer Carrillo replied Copas did not. (RT 2860.) Officer Carrillo stated Copas did not ask for leniency or a reward. (RT 2861.) Officer Underhill also spoke with Copas at the sheriff's department initially and testified he did not promise Copas anything in return for his statement at that time. (RT 3036-37.)

D. PETITIONER'S TESTIMONY AND EXPLANATIONS

1. THE INSURANCE

Petitioner conceded he met with his insurance agent the day after the murders. (RT 3677-78.) Petitioner explained the

meeting was arranged because he needed someone to talk to, although he also stated his relationship with the agent was "strictly business." (RT 3677-78.)

2. MARIA ESTRELLA

When asked about his relationship with Maria Estrella, Petitioner acknowledged he gave money to Estrella, but denied telling Johnny he was in love with her. (RT 3627.) To the extent Johnny's trial testimony differed, Petitioner testified Johnny was a liar. (RT 3626; 3628-29.)

3. POISON LIST

Petitioner admitted using his own encyclopedia to research the various poisons contained in the list and admitted writing the list. (RT 3769.) Petitioner stated that it was Wixom, and not Petitioner, who wanted the list, however. (RT 3768-69.) Petitioner said Wixom wanted the list because Wixom was interested in fishing with poison, a fishing technique employed in South America. (RT 3274-75.)

Petitioner was questioned about the words "tasteless, fast acting, untraceable" written at the bottom of the list. (RT 3777.) Petitioner explained he wrote this because he knew these poisons would work fast to kill fish, would be tasteless in the fish, and would not leave a trace of the poison in the fish for humans to ingest. (RT 3777-78.) Petitioner conceded he would never personally use any of the poisons he wrote down on the list for fishing. (RT 3772.) Petitioner also stated that Botulinus toxin was a "very deadly poison." (RT 3772.)

Petitioner testified Wixom was a liar. (RT 3783-84.)

4. MARTHA MEZA

Petitioner testified that, although he purchased some rings for Meza, he did not know what "engagement ring" meant. (RT 3308.) Petitioner had testified he was fluent in English, however, and used idiomatic English phrases such as "cheat[ing] on my wife" and "ups and downs" during his testimony. (RT 3610-11; 3453.)

5. THE GOLD JEWELRY

At trial, Petitioner asserted that prior to the murders, Grace had some of the gold jewelry and Meza had the rest. (RT 3324-25; 3692.) Petitioner denied telling Meza to get rid of the jewelry. (RT 3696.) Petitioner stated that he never asked Meza to return the jewelry because he "never thought about it any more." (RT 3512.)

Petitioner stated Meza was a pathological liar. (RT 3331; 3701; 3719.)

5. LABOR AND MATERIALS NOTEBOOK

Petitioner was questioned extensively about the diagram in the "Labor & Materials" notebook. When police asked the purpose of the diagram, Petitioner could not explain. (RT 2946-47.) At trial, Petitioner responded, "[o]ne of the purposes that it could have been was to modify the interior of the house." (RT 3544.) When asked at trial when he had made the diagram, Petitioner first testified he made the diagram in 1979, prior to rebuilding his house, which had burned down in a fire. (RT 3544-45; 3574.) Later, Petitioner stated he drew the diagram after his house was rebuilt. (RT 3574.) Finally, Petitioner stated the diagram was drawn after the house burned down, but before it was rebuilt. (RT 3588.)

The diagram showed the floor plan of Petitioner's residence with X's, lines and rectangles drawn on it. (RT 2915-16; 3541-58.)

Petitioner explained some of the markings on the diagram as follows: (1) the large rectangle located in the garage where Grace's car normally would have been parked represented a pool table (RT 3553; 3584); (2) the box in Daphne's room where her bed normally was located represented where Petitioner would have put furniture if he had swapped Daphne's room with the spare room (RT 3579-81); (3) the arrow from the front of the residence to the front door showed the entrance to the residence because Petitioner intended to keep the entrance the same (RT 3583-84); (4) the line that went from the front yard into the garage and pointed to the end of the large rectangle in the garage (or pool table) was not really a line at all (RT 3584); (5) the line that went through the door to the garage, basically the route Grace would take to get to her car from the residence, was just a little line Petitioner made (RT 3589-90); (6) the little "dot" behind the garage door, where someone could hide from a person entering the garage from the residence, just showed where Petitioner put his pen down (RT 3590). Petitioner did not explain the "dot" in the rectangle (or pool table) located about where the glove box of Grace's car, and her garage door opener, would be located (RT 3584-85).

Petitioner testified Grace wanted these modifications because she wanted to move the washer and water heater into the garage. (RT 3576-77.) Petitioner conceded, however, that the diagram did not specifically show where the washer or water heater were located originally, nor did the diagram specifically show where they were to be relocated. (RT 3577-78.) The floor plan of the residence was not changed after the fire. (RT 3236.)

7. THE "HUNTING" TRIP

Petitioner strongly emphasized that, contrary to Fischer's testimony, he did not stop two times on the side of the road to rest. (RT 3733.) Petitioner stated Fischer was either mistaken or lying. (RT 3733.)

Petitioner agreed there was no shooting on the hunting trip. (RT 3737.) Petitioner explained he would not fire his gun unless there is game to shoot, because it would be a waste of ammunition. (RT 3736.) Petitioner's neighbor Michael Hovden testified, however, that he and Petitioner had gone "hunting" twice in the past and both times he and Petitioner would shoot at targets, but purposely not shoot at live game even though live game was around. (RT 3829-30; 3833-34.)

8. THE BURGLARY

Petitioner explained that, when he entered his residence upon returning from the hunting trip, he knew something was wrong and believed his wife and daughter were gone. (RT 1562; 1567; 3752.) Petitioner had these fears, even though he only had taken a few steps into his residence, because he saw books stacked on the floor. (RT 3752.) Grace was a very neat housekeeper and it was very odd for anything to be on the floor. (RT 3752.)

9. THE LETTER TO VICTOR VASQUEZ

Petitioner conceded he wrote the letter to Victor. (RT 3630; 3638.) Petitioner explained the purpose of the letter was to ask Victor to talk to Petitioner's lawyer. (RT 3638.) To the extent Victor disagreed with Petitioner's version of the facts, Petitioner testified Victor was scared of Copas. (RT 3632.)

10. COPAS

Petitioner met Copas through Johnny Vasquez because Petitioner needed someone to do a painting job. (RT 3622.) Petitioner, however, did not hire Copas. (RT 3625.) According to Petitioner, Copas then demanded money from Petitioner. (RT 3632-33.) Petitioner claimed Copas threatened his life. (RT 3634.) At trial, Petitioner first testified he was never afraid of Copas, did not believe him to be dangerous and did not care about his threats. (RT 3634.) Petitioner later testified, however, that he

sent Suren to the Netherlands at 3:30 a.m. the night of his arrest because he believed Copas was dangerous.[4] (RT 2050-51; 2056; 3047-48; 3523; 3529.) When questioned by police shortly after the murders about possible suspects, however, Petitioner never named Copas. (RT 2902; 3016.)

Petitioner testified Copas either had a bad memory or was a liar. (RT 3624-25.)

III. TRIAL, DELIBERATIONS AND VERDICT

The trial began on December 10, 1985. The jury began deliberations on January 16, 1986. (RT 4360-61.) The jury deliberated one and one-half days. (RT 4361-80.) The jury found Petitioner guilty of two counts of murder and one count of solicitation to commit murder. (RT 4380-81.)

IV. PROCEEDINGS AFTER TRIAL

Petitioner filed a petition for writ of habeas corpus with the California Superior Court. After conducting an evidentiary hearing, Judge Ziebarth granted Petitioner's petition and made the following factual findings:

> (1) At the time Copas contacted Officer Carrillo, Copas had a pending misdemeanor narcotics offense and a pending five count theft case (Ruling on Petition for Writ for Habeas Corpus in Superior Court, Pet. Exhibit A ("Sup. Ct. Op.") at 3);
>
> (2) Copas' pending cases were continued several times during the course of the year (Sup. Ct. Op. at 3-4);

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4. Petitioner was arrested eight months after the murders. (RT 2316; 2050-51; 3523.) Petitioner obviously did not perceive Copas as a threat until then because until Petitioner's arrest, Suren was living with neighbors. (RT 2048-49, 3529.)

(3) Copas "used a ruse to bring Detective Underhill to the jail so he could request assistance in gaining release" on Copas' new burglary charge (Sup. Ct. Op. at 4);

(4) "Copas was arrested on a narcotics charge in April of 1985. In May, [the prosecutor] made a motion for Copas' release on his own recognizance on his pending misdemeanor and felony cases" (Sup. Ct. Op. at 4);

(5) "On August 1, 1985, Copas entered an open plea of guilty to a March 1985 burglary with a maximum three year sentence. Six pending misdemeanor charges were dismissed at the same time" (Sup. Ct. Op. at 4);

(6) At the sentencing for Copas' 1985 burglary offense, Copas' attorney made an entry in her file that "D is testifying for [the prosecutor] on PC Singh 187 case. Something will be done for D after testimony-cont till that case is over" (Sup. Ct. Op. at 4);

(7) The prosecutor spoke to Copas' probation officer regarding Copas' March 1985 burglary conviction and told the officer Copas was cooperative and that Copas "might get killed" if sent to prison (Sup. Ct. Op. at 5);

(8) Copas was arrested for another burglary charge on December 1, 1985. Copas testified for the prosecution on December 11, 1985. Copas' March 1985 burglary case was continued so that a satisfactory disposition could be reached for both burglary cases. The prosecutor appeared at the dual sentencing. Petitioner received a sentence of credit for time served (Sup. Ct. Op. at 5-6);

(9) Copas tested positive for heroin use at the time he first came forward to officers to volunteer information in Petitioner's case (Sup. Ct. Op. at 6);

(10) Petitioner's counsel apparently knew the following facts about Copas prior to trial:

a. he had been convicted of three felonies;
b. his first felony conviction was in 1958 for the sale of marijuana;
c. his second and third convictions were in 1965 for "sales, possession and failing to register";
d. in March 1985, Copas had cases pending for giving false information and theft;
e. Copas' family was receiving protection from the witness protection program;
f. Copas had used heroin in the past; and
g. Copas' last use of heroin was about 6 years earlier (Sup. Ct. Op. at 6-8).

(11) Petitioner's counsel did not know, or did not recall, the following information:

a. Copas' misdemeanor cases had been continued for over one year due to Copas' status as a witness;
b. Copas actually received money and a residence through the witness protection program;
c. Copas' 1984 heroin case was not dismissed for lack of evidence, but dropped as part of a plea bargain;
d. Copas was not given a three year sentence on his December 1984 burglary case; rather, the case was never pursued by the district attorney;
e. after his March 1985 burglary arrest, Copas requested help in obtaining a release;
f. in May 1985, the prosecutor sought release for Copas on his own recognizance on his pending misdemeanor or felonies; and

> g. the prosecutor told Copas' probation officer that Copas might be killed if sent to prison (Sup. Ct. Op. at 8-9).

The Superior Court concluded that the prosecutor "entered into an oral agreement with Copas and his counsel to assist Copas in receiving certain benefits in exchange for his testimony against the petitioner." (Sup. Ct. Op. at 12.) The Superior Court also concluded that, based upon a declaration submitted by Copas, "[t]he weight of the evidence strongly suggests that when Copas testified during the petitioner's trial that he had not used heroin prior to his trial testimony, such testimony was probably false. Furthermore, [the prosecutor] knew or should have known that Copas was still a heroin addict at that time." (Sup. Ct. Op. at 12.)

Based upon these findings from the evidentiary hearing, the Superior Court could not "find beyond a reasonable doubt that the constitutional error that occurred during petitioner's trial was harmless." (Sup. Ct. Op. at 17.)

The California Court of Appeal reversed the Superior Court and denied Petitioner's petition. In its opinion, the Court of Appeal found "[t]he evidence was sufficient to support the trial court's finding" that there was an oral agreement to provide benefits to Copas in exchange for his testimony. (Court of Appeal decision, Pet. Exhibit B, ("Ct. Ap. Op.") at 27-28.)

The Court of Appeal concluded, however, that the declaration submitted by Copas stating he used heroin prior to his trial testimony, was inadmissible under the California hearsay rules. (Ct. Ap. Op. at 25-27.) In light of the finding of inadmissibility of the declaration, the Court of Appeal found:

> [T]here was no evidence to sustain the sole finding of false testimony; i.e., that Copas had lied when he denied he used heroin recently before his trial testimony. Even if burglary is a crime "typically" committed by drug

addicts, the mere fact that Copas was charged with burglary a few days before his trial testimony does nothing to 'prove' Copas was then using heroin. (Ct. Ap. Op. at 27.)

Based upon their findings and a review of the evidence, the Court of Appeal concluded "there is no reasonable probability the result would have been different had the evidence of benefits been disclosed to the defense." (Ct. Ap. Op. at 29.) The Court of Appeal found the "evidence against [Petitioner] crushing." (Ct. Ap. Op. at 29.)

Federal habeas courts ordinarily defer to underlying findings of historical fact made by state trial and appellate courts, provided those findings are fairly supported by the record. Sumner v. Mata, 455 U.S. 591, 592-93, 596-97 (1982); see Wainwright v. Witt, 469 U.S. 412, 426 (1985) (a state court's findings of fact are entitled to a presumption of correctness); 28 U.S.C. § 2254(d). Upon review of the evidentiary hearing transcripts lodged in this case, it is evident the Court of Appeal's findings, and the Superior Court's findings excluding its finding based upon Copas' inadmissible declaration, are fairly supported by the record. This Court defers to those findings.[5]

V. SUMMARY OF PETITIONER'S CONTENTIONS

Petitioner asserts the following grounds for habeas relief:

1. The prosecutor's suppression of an agreement with Copas to provide benefits in exchange for

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5. This conclusion is not altered by the application of the Antiterrorism and Effective Death Penalty Act of 1996. Petitioner has not shown by clear and convincing evidence that any factual determination made by the state courts should not be presumed correct. See 28 U.S.C. § 2254(e)(1) (as amended April 24, 1996).

Copas' testimony requires vacation of Petitioner's convictions (Pet. at 34-41);

2. A new trial is required because of the prosecutor's alleged knowing use of perjured testimony by Copas:
   a. regarding benefits promised to Copas; and
   b. regarding Copas' heroin use (Pet. at 42-50).

VI. DISCUSSION

For the reasons discussed herein, the Petition should be denied and dismissed with prejudice.

1. BRADY VIOLATION

Petitioner contends that, had the prosecution disclosed to the defense the evidence that Copas had been promised or received benefits in exchange for his testimony against Petitioner, the results of the trial would have been different. (Pet. at 34-41.) Petitioner bases his argument on three points: (1) the prosecutor's statement during the evidentiary hearing that, had the jury known Copas had received benefits in exchange for his testimony, it would have been the "kiss of death"; (2) the prosecutor's effort to lie about Copas receiving benefits at the state evidentiary hearing; and (3) the "complete lack of evidence tying Singh to solicitation of murder." (Pet. at 41.)

"[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different.'" Kyles v. Whitley, 115 S. Ct. 1555, 1565 (1995) (quoting United States v. Bagley, 473 U.S. 667, 682 (1985)); see Brady v. Maryland, 373 U.S. 83, 87 (1963). Evidence impeaching a government

witness "falls within the Brady rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence." United States v. Brumel-Alvarez, 991 F.2d 1452, 1458 (9th Cir. 1992); see Kyles v. Whitley, 115 S. Ct. 1565. Additional evidence tending to undermine the credibility of a witness who has already been impeached, is not material, however. United States v. Strifler, 851 F.2d 1197, 1202 (9th Cir. 1988), cert. denied, 489 U.S. 1032 (1989); United States v. Petrillo, 821 F.2d 85, 89 (2nd Cir. 1987).

"A 'reasonable probability' of a different result is accordingly shown when the [g]overnment's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 115 S. Ct. at 1566 (quoting United States v. Bagley, 473 U.S. at 678). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Id. at 1566. The Court must look at the suppressed evidence as a whole, not item by item. Id. at 1567. Once an error is found under the Brady standard, it subsequently cannot be found harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993). Id.

Courts have found failure to disclose to the defense the existence of a deal with a government witness harmful when the "[g]overnment's case depended almost entirely on [the witness'] testimony." Giglio v. United States, 405 U.S. 150, 154 (1972); see Bagley v. Lumpkin, 798 F.2d 1297, 1301 (9th Cir. 1986). In other words, where the testimony by the government witness is corroborated by other evidence, the fact that the jury did not know the witness received benefits in exchange for his testimony may not be harmful. See United States v. Petrillo, 821 F.2d at 89-90.

Courts also have looked to whether the government witness committed perjury while testifying as a factor in determining harmfulness. "Evidence of bias and prejudice is certainly material for impeachment, but lies under oath to conceal bias and prejudice

raise the impeachment evidence to such a level that it is difficult to imagine anything of greater magnitude that would undermine confidence in the outcome of any trial." Bagley v. Lumpkin, 798 F.2d at 1301.

In the present proceeding, Copas received benefits as a result of his testimony against Petitioner. (Sup. Ct. Op. at 12.) This type of impeachment evidence falls within the Brady rule. See Kyles v. Whitley, 115 S. Ct. 1565; United States v. Bagley, 473 U.S. at 676. Upon review of the entire record, however, the Court does not find a reasonable probability that, had the evidence been disclosed to the defense, the results of the proceeding would have been different. See Kyles v. Whitley, 115 S. Ct. at 1566.

First, the trial evidence of Petitioner's culpability was overwhelming even without Copas' testimony. See Kyles v. Whitley, 115 S. Ct. at 1566, 1569-75; c.f. Giglio v. United States, 405 U.S. at 154-55. Extremely damaging evidence against Petitioner included: (1) Petitioner and his wife had combined earnings of only $22,000 in 1983, yet paid over $200 a month for 1.2 million dollars in life insurance (RT 2073; 2085; 3620; 3673-76); (2) Petitioner earned only $10,000 in 1983, yet told Victor Vasquez and Martha Meza that he would have a lot of money soon (RT 1619; 1906; 3620); (3) the testimony of Wendell Wixom concerning Petitioner's request to obtain "tasteless, fast acting, untraceable" poisons (RT 2228-30; 3274-75; 3768-78); (4) Petitioner's diagram of his residence seemingly showing the plan for the murders, for which Petitioner provided an unconvincing explanation (RT 2915-16; 2946; 3541-58; 3574-90); (5) Petitioner's engagement to Meza a week before the murders (RT 1921-22; 3307-09); (6) Petitioner's statement to Meza a week before the murders that he wanted his wife and stepdaughter dead (RT 1924); (7) Petitioner's statements regarding his intent: that no one walks away from him and that he knows how to shut people up (RT 1932); (8) Petitioner's peculiar "hunting" trip which conveniently gave Petitioner an alibi for the exact time of the murders, alibi witnesses, and a reason to remove all the guns from the residence

(RT 1704; 1718-32; 2886; 2937; 3458-75; 3730-39); (9) Petitioner's uncanny "feeling" the victims were "gone" after seeing books stacked on the floor (RT 3491-92; 3499-3502; 3752); (10) Petitioner's lie to police that the gold jewelry had been stolen when Petitioner had given the jewelry to Meza (RT 2957; 2977; 3015; 3055; 3692-93); (11) Petitioner's decision to contact his life insurance agent the day after the murders, even though his relationship with the agent was "strictly business" (RT 2102-05; 3677-78); (12) Petitioner's attempts to persuade witnesses to lie (RT 1735-36; 2406-07; 353637); and (13) the implausibility of Petitioner's attempts to explain away a wealth of incriminating evidence against him.

As stated above however, the standard is not the sufficiency of the evidence against Petitioner without Copas' testimony. Rather, the standard is whether there is a reasonable probability that, had the suppressed evidence of Copas' benefits been admitted, there would have been a different result.

Thus, the Court must consider all the evidence described above, plus the evidence of Copas' testimony. The Court then must weigh the potential impact on Copas' testimony of the impeachment evidence regarding Copas' deal with the prosecutor. The Court also must weigh the likelihood that Copas' credibility would have been rehabilitated, because Copas' first statement to police was made without any deals, and the essence of that statement was consistent with Copas' trial testimony. After weighing all of this evidence, the Court concludes, there is no reasonable probability of a different result. See Kyles v. Whitley, 115 S. Ct. at 1565.

This is true notwithstanding Petitioner's assertion the prosecutor exploited his own concealment of Copas' benefits during closing argument. In his closing, the prosecutor made a remark that there were no shenanigans going on behind the scenes and that only Petitioner had a motive to lie. (RT 4290; 4298-99) Although this statement was not forthright, it does not alter this

Court's conclusion that there is no reasonable probability the result of the trial would have been different.

Second, Copas' testimony about the murders was corroborated by other evidence. The "murder" took place in a manner similar to Copas' description. (RT 1805-09.) The diagram found in Petitioner's Labor and Materials notebook detailed almost exactly Copas' version of the plan Copas had testified he and Petitioner had plotted. (RT 1805-09.) Johnny Vasquez testified he introduced Copas to Petitioner because he knew Petitioner wanted someone to do a job. (RT 1526.) Copas accurately could describe the interior and exterior of Petitioner's residence. (RT 1824; 1875-81.) Copas knew Petitioner's residence had a Genie garage door opener and knew a garage door opener was kept in the glove box of Grace's car. (RT 1807-08.) Copas knew what time Grace went to work every day. (RT 1806.) Copas knew about the insurance money prior to press disclosure of the insurance. (RT 1822.) Additionally, Petitioner himself unwittingly corroborated Copas' testimony by referring to Copas in the letter Petitioner sent to Victor even though the police had not yet revealed Copas' identity. (RT 2038; 3034-35.) Moreover, none of the substance of Copas' testimony was ever retracted or recounted by Copas.

Third, evidence Copas received benefits in exchange for his testimony would not have been the only evidence impeaching Copas; Petitioner's trial counsel used a variety of other material to impeach this witness. See United States v. Strifler, 851 F.2d at 1202; United States v. Petrillo, 821 F.2d at 89. For instance, Copas originally testified he had been sentenced to three years for his 1984 burglary. (RT 1841.) Later, Copas admitted he had not yet been sentenced on that charge. (RT 1842.) Still later, Copas testified he had in fact been sentenced. (RT 1843.) Copas also was impeached based upon his extensive criminal history and drug use. (RT 1831-45.) In addition, Copas admitted at trial he had testified wrongly during Petitioner's preliminary hearing when he stated Johnny was with him when he met Petitioner the second time. (RT 1890-91.) Further, during closing argument, Petitioner's

counsel amplified this impeachment evidence against Copas. (RT 4337-38; 4344; 4345.)

Fourth, even if the evidence that Copas received benefits in exchange for his testimony at trial had been placed before the jury, the result would have been additional impeachment evidence, but not a demonstration of perjury by Copas concerning either the substance of his testimony or on any collateral issue. As discussed in more detail infra, nothing in the record demonstrates that any of Copas' testimony was untrue. Copas' deal with prosecutors sometime after his initial interview with officers may have been admissible to impeach Copas' bias for testifying. The admission of the evidence of benefits, however, would not have demonstrated Copas perjured himself at trial since he was never directly asked if he was receiving benefits in exchange for his testimony. See Bagley v. Lumpkin, 798 F.2d at 1301. In addition, as discussed above, Copas' prior consistent statement to police would have rehabilitated Copas and rendered even the additional impeachment evidence of marginal consequence.[6] In any event, Copas was never impeached concerning the substance of his testimony against Petitioner.

The withholding of Brady material is to be condemned. This Court, however, cannot conclude that had the evidence that Copas received benefits in exchange for his testimony been introduced at trial, there is a reasonable probability of a different result. See Kyles v. Whitley, 115 S. Ct. at 1566.

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6. As this Court reviews the record de novo, the opinions of the Superior Court and the prosecutor concerning Copas' importance to the prosecution's case are not binding. See Suniga v. Bunnell, 998 F.2d 664, 667 (9th Cir. 1993) ("harmlessness is a mixed question of fact and law which [federal courts] review de novo").

2. ALLEGED PRESENTATION OF FALSE TESTIMONY

The presentation of perjured or false testimony warrants relief where there exists "any reasonable likelihood" that the false testimony could have affected the verdict. United States v. Agurs, 427 U.S. 97, 103 (1976); Napue v. Illinois, 360 U.S. 264, 271 (1959); Bonin v. Calderon, 59 F.3d 815, 844 (9th Cir. 1995), cert. denied, 116 S. Ct. 718 (1996); United States v. Young, 17 F.3d 1201, 1203 (9th Cir. 1994).[7] At least one Circuit has described the Agurs/Napue standard as "considerably less onerous" than the Brady standard. Kirkpatrick v. Whitley, 992 F.2d 491, 497 (5th Cir. 1993). The Agurs/Napue standard appears to remain applicable to habeas cases even after Brecht v. Abrahamson, 507 U.S. 619 (1993). See Bonin v. Calderon, 59 F.3d at 844 (post-Brecht case continuing to apply Agurs/Napue standard).

a. Copas' Receipt of Benefits in Exchange For His Testimony

Petitioner contends the prosecutor: (1) knowingly allowed Copas to lie to the jury about Copas' motivation in appearing as a prosecution witness; (2) failed to correct Copas' perjury; and (3) used perjury to the prosecution's benefit in closing argument. (Pet. at 47.)[8]

The record does not support Petitioner's claims. There is no evidence Copas testified falsely when he stated he originally spoke with officers because it bothered his conscience that a young girl had died. Although the record supports a finding that, after his

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7. Panels of the Ninth Circuit are split as to whether the presentation by the prosecutor of false or perjured evidence must be "knowing" for there to be a constitutional deprivation. Compare Bonin v. Calderon, 59 F.3d 815, 844 (9th Cir. 1995) and United States v. Young, 17 F.3d at 1203-04. Under the facts of the instant case, however, this conflict is not material.

8. As discussed infra, Copas did not testify falsely. Petitioner's assertions in his Petition to the contrary are mistaken at best.

original statement to officers, Copas did receive benefits, Copas was not questioned at trial concerning his motivation for testifying at trial. Rather, at trial, Copas only was asked why he originally gave his statement to the police. The fact Copas later was promised and received benefits is not inconsistent with Copas' testimony regarding why he originally came forward.

As there is no evidence Copas testified falsely regarding his motivation for coming forward originally, and because Copas was never asked his motivation for testifying at trial, the prosecutor did not present false or perjured testimony.

Even assuming arguendo the prosecutor did present false evidence, for the reasons discussed above, although under a lesser standard, the Court finds any such presentation harmless. See United States v. Agurs, 427 U.S. at 103; Napue v. Illinois, 360 U.S. at 271.

b. Copas' Use Of Heroin

Petitioner contends the prosecutor knowingly presented false or perjured testimony when he failed to correct Copas' testimony that he had not used heroin prior to his trial testimony. (Pet. at 48-49.)

The Superior Court found, based in part on a declaration by Copas, that the "weight of the evidence strongly suggests that[,] when Copas testified during the [P]etitioner's trial he had not used heroin prior to his trial testimony, such testimony was probably false." (Sup. Ct. Op. at 12.) The Court of Appeal rejected Copas' declaration, finding it inadmissible hearsay. (Ct. Ap. Op. at 25-27.) Without Copas' declaration, the Court of Appeal found no evidence that "Copas had lied when he denied he used heroin recently before his trial testimony." (Ct. Ap. Op. at 27.) As "state courts are the ultimate expositors of state law," this Court does not contest that conclusion. See Mullaney v. Wilber, 421 U.S. 684, 691

(1975); see also Oxborrow v. Eikenberry, 877 F.2d 1395, 1399 (9th Cir.), cert. denied, 493 U.S. 942 (1989).

Deferring to the Court of Appeal's finding, there is no evidence Copas testified falsely at trial concerning his recent heroin use. See Sumner v. Mata, 455 U.S. at 592-93. Therefore, the prosecutor did not present false or perjured testimony concerning Copas' recent use of heroin.

Again, even assuming arguendo that false evidence was presented by the prosecutor concerning Copas' heroin use, for the reasons discussed above, although under a lesser standard, the Court finds any such error harmless. See United States v. Agurs, 427 U.S. at 103; Napue v. Illinois, 360 U.S. at 271.[9]

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9. The foregoing analysis requires denial of the instant Petition without reference to the "Habeas Corpus Reform Act" enacted on April 24, 1996, as part of the "Antiterrorism and Effective Death Penalty Act of 1996." If the "Habeas Corpus Reform" provisions apply to the instant Petition, the result would be the same, for the additional reason that the state court adjudications did not "result[] in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or . . . result[] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (as amended April 24, 1996); see Remeta v. Singletary, 85 F.3d 513, 515, n.1 (11th Cir. 1996).

VII. RECOMMENDATION

For all of the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying and dismissing the Petition with prejudice.

DATED: July 23, 1996

VIRGINIA A. PHILLIPS
UNITED STATES MAGISTRATE JUDGE

JUDGMENT ON PETITION FOR WRIT OF HABEAS CORPUS

Filed September 13, 1996

[Caption Omitted in Printing]

Pursuant to the Order Approving the Report and Recommendation of the United States Magistrate Judge, including the findings and conclusions therein,

IT IS ADJUDGED that the Petition is denied with prejudice.

DATED: September 13, 1996

ROBERT J. TIMLIN
United States District Judge

ORDER (1) APPROVING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE AND ACCEPTING HER FINDINGS AND CONCLUSIONS, AND (2) DENYING THE PETITION FOR WRIT OF HABEAS CORPUS

Filed September 13, 1996

[Caption Omitted in Printing]

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition For Writ of Habeas Corpus ("Petition"), all of the records herein and the attached Report and Recommendation of the United States Magistrate Judge ("Report"). Further, the Court has made a de novo determination of those portions of the Report and proposed findings and conclusions, or recommendations therein, to which Petitioner has objected.[1]

IT IS ORDERED (1) that the Court approves and adopts the Report including all findings, conclusions and recommendations, and (2) that the Petition be denied and Judgment be entered denying the Petition with prejudice.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Report and Judgment by United States mail on Petitioner and counsel for Respondents.

DATED: September 13, 1996

ROBERT J. TIMLIN
United States District Judge

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1. The Court noted one minor typographical error. On page 16, line 7, the first "Petitioner" should be changed to "Copas".

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAITSEN J. SINGH,
Petitioner-Appellant,

v.

K.W. PRUNTY, WARDEN; ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,
Respondents-Appellees.

OPINION
Filed April 27, 1998

LAY, Circuit Judge:

Jaitsen J. Singh, a California state prisoner, appeals the denial of his petition for a writ of habeas corpus. We reverse and grant the petition.

Factual and Procedural Background

This case arises out of a series of bizarre events culminating in Singh's convictions for murder and for solicitation to commit murder. The State of California convicted Singh of hiring an assailant or assailants (still unknown) to murder his wife, Grace, and his seventeen-year-old stepdaughter, Daphne. The murders occurred on August 27, 1983. On that date, Grace and Daphne disappeared from the Singhs' residence. The home had apparently been burglarized, and police found a bloody baseball bat in the hall. Singh told police the assailant(s) had stolen cash and jewelry. However, the evidence shows that sometime before the murders, Singh gave the jewelry to his girlfriend, Martha Meza.

Police found the bodies of Grace and Daphne in the trunk of Grace's car, which had been abandoned in Los Angeles. The women had been strangled with electrical cords (removed from Singh's home), beaten, and stabbed. The record is replete with circumstantial evidence pointing to Singh's knowledge of and motive for a planned murder of Grace and Daphne. However, the State concedes Singh did not kill Grace and Daphne, as Singh was on a hunting trip at the time of the murders.[1]

Police did not make any arrests for the murders until early April 1984. On April 3, 1984, Raymond R. Copas, who was in jail on that date, approached police claiming to have information on the Singh murders. Copas apparently told police that Singh had previously tried to hire him to murder Grace. Copas was a known heroin user and an admitted heroin addict. He had a long criminal record involving several burglaries and heroin-related offenses. The record in this case indicates Copas financed his heroin use through a series of burglaries and thefts.

Shortly after Copas approached police with this information, police arrested Singh. Copas testified at Singh's preliminary hearing held in May 1984. Despite Copas' testimony at the hearing, charges against Singh were dismissed. Singh was not bound over for trial until after a second preliminary hearing held in March 1985.

At Singh's trial, Copas testified on behalf of the State. Copas testified that in January 1983, Johnny Vasquez, a mutual acquaintance of Copas' and Singh's, contacted him and introduced him to Singh, because Singh wanted to hire Copas to murder Grace. The plan, according to Copas, was for Copas to ambush Grace at home, hit her over the head with a baseball bat, and put her body in the trunk of a car. Singh allegedly told Copas to make the house look like a robbery had occurred. According to Copas,

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1. The State asserts the hunting trip was a ruse, and Singh arranged it to give himself an alibi.

Singh directed him to abandon Grace's car in Los Angeles or Palm Springs following the murder, and Singh told Copas he would pay him $10,000 out of insurance money Singh expected to receive in the near future. Copas testified he did not carry out the murder, and when Singh called to ask why he had not done so, he told Singh he would do it in his own time. Copas said he later assumed the murder contract was over.[2] Copas testified at trial that the reason he approached police with the information was because he was bothered about Daphne's murder.

Following his convictions, Singh appealed to the California Court of Appeal. The court of appeal affirmed Singh's convictions in an unpublished opinion, and the California Supreme Court denied review.

A. *State Habeas Proceedings*

Thereafter, Singh filed a petition for a writ of habeas corpus in the Superior Court of the State of California for the County of San Bernardino. Singh claimed the State violated the requirements set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), thereby denying him due process and a fair trial. He argued the State's prosecutor, Dennis Stout, did not disclose to him or to his counsel evidence that Copas had been promised certain benefits in exchange for his testimony.[3] Singh also urged that Copas had lied during trial when asked about his recent heroin use, and Stout knowingly allowed Copas to present this false testimony.

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2. Copas' relationship with Singh was apparently not over. According to Copas, Singh later hired him to beat up a man, and he paid Copas $300 for the job.

3. These benefits, discussed *infra*, related to favorable treatment Copas received regarding his various criminal charges and convictions.

The superior court judge[4] held an evidentiary hearing. After the hearing, the court found Stout had entered into an agreement with Copas and Copas' counsel to provide Copas with benefits in exchange for his testimony against Singh, and Stout did not disclose evidence of the agreement to Singh's counsel. The court also concluded Copas had probably lied at Singh's murder trial when he denied using heroin prior to his trial testimony, and Stout knew or should have known that Copas was still a heroin addict at that time. The superior court granted the writ, concluding the prosecution's error of failing to disclose evidence of the agreement was not harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 24 (1967),[5] and under *Brady*, the State had denied Singh his constitutional rights to due process and a fair trial.

The State appealed to the California Court of Appeal. The court of appeal concluded the evidence presented during the evidentiary hearing was not sufficient to sustain the Superior Court's ruling that Copas had lied at Singh's trial when he denied he used heroin before his trial testimony.[6] The court did find, however, that the evidence presented during the evidentiary hearing was sufficient to support a finding of some agreement to provide beneficial treatment to Copas in exchange for his testimony at Singh's trial. Nonetheless, the appellate court concluded the State's nondisclosure did not violate Singh's constitutional rights. The court reached this conclusion after

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4. The Honorable Kenneth G. Ziebarth, Superior Court of the State of California for the County of San Bernardino.

5. The harmless error rule no longer applies to *Brady* violations. *See Kyles v. Whitley*, 514 U.S. 419, 435-36 (1995).

6. The court reached this conclusion after finding that Copas' 1991 declaration (presented as part of the state habeas proceeding), in which he said he lied about his heroin use during Singh's trial, was inadmissible hearsay under California evidentiary rules. *People v. Singh*, No. E014389, slip op. at 27 (Cal. Ct. App. Aug. 15, 1995) (citing Cal. Evid. Code § 1230).

finding that under the overall circumstances of the case, there was no reasonable probability that had the evidence of benefits been disclosed to the defense, the result of Singh's trial would have been different. The court reversed, observing the evidence against Singh was "crushing." *Singh*, No. E014389, slip op. at 29. Singh appealed, and the California Supreme Court denied review.

B. *Federal Habeas Proceedings*

Singh then filed a petition for writ of habeas corpus in the United States District Court pursuant to 28 U.S.C. § 2254. In his petition, Singh alleged two grounds for relief. First, Singh alleged the prosecution denied him due process and a fair trial when it suppressed evidence of an agreement by the prosecution to provide benefits to Copas in exchange for Copas' testimony at Singh's trial. Second, Singh alleged the prosecution knowingly allowed Copas to commit perjury regarding Copas' motivation for testifying and his recent heroin use.

The United States Magistrate Judge[7] found the State provided benefits to Copas after Copas initially approached police and after he testified at Singh's preliminary hearing. Despite this conclusion, the magistrate judge rejected Singh's petition. She found the trial evidence of Singh's culpability to be overwhelming even without Copas' testimony. The magistrate judge also emphasized that additional evidence corroborated Copas' testimony.

The magistrate judge acknowledged that the test for determining materiality of evidence suppressed by the prosecutor is not sufficiency of evidence. *Kyles*, 514 U.S. at 434. However, the magistrate judge, in weighing whether there was a reasonable probability of a different result, outlined the evidence implicating Singh in the murders. She observed:

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7. The Honorable Virginia A. Phillips, United States Magistrate Judge for the Central District of California.

> Extremely damaging evidence against Petitioner included: (1) Petitioner and his wife had combined earnings of only $22,000 in 1983, yet paid over $200 a month for 1.2 million dollars in life insurance; (2) Petitioner earned only $10,000 in 1983, yet told Victor Vasquez and Martha Meza that he would have a lot of money soon; (3) the testimony of Wendell Wixom concerning Petitioner's request to obtain "tasteless, fast acting, untraceable" poisons; (4) Petitioner's diagram of his residence seemingly showing the plan for the murders, for which Petitioner provided an unconvincing explanation; (5) Petitioner's engagement to [Martha] Meza a week before the murders; (6) Petitioner's statement to Meza a week before the murders that he wanted his wife and stepdaughter dead; (7) Petitioner's statements regarding his intent: that no one walks away from him and that he knows how to shut people up; (8) Petitioner's peculiar "hunting" trip which conveniently gave Petitioner an alibi for the exact time of the murders, alibi witnesses, and a reason to remove all the guns from the residence; (9) Petitioner' s uncanny "feeling" the victims were "gone" after seeing books stacked on the floor; (10) Petitioner's lie to police that the gold jewelry had been stolen when Petitioner had given the jewelry to Meza; (11) Petitioner's decision to contact his life insurance agent the day after the murders, even though his relationship with the agent was "strictly business"; (12) Petitioner's attempts to persuade witnesses to lie; and (13) the implausibility of Petitioner's attempts to explain away a wealth of incriminating evidence against him.

Singh v. Prunty, No. CV-96-0057 (C.D. Cal. 1996) (magistrate judge's report and recommendation) (citations omitted).

The magistrate judge also emphasized the evidence corroborated Copas' testimony regarding Singh's involvement in the murders. She observed:

> The "murder" took place in a manner similar to Copas' description.[8] The diagram found in Petitioner's Labor and Materials notebook detailed almost exactly Copas' version of the plan Copas had testified he and Petitioner had plotted. Johnny Vasquez testified he introduced Copas to Petitioner because he knew Petitioner wanted someone to do a job. Copas accurately could describe the interior and exterior of Petitioner's residence. Copas knew Petitioner's residence had a Genie garage door opener and knew a garage door opener was kept in the glove box of Grace's car. Copas knew what time Grace went to work every day. Copas knew about the insurance money prior to press disclosure of the insurance. Additionally, Petitioner himself unwittingly corroborated Copas' testimony by referring to Copas in the letter Petitioner sent to Victor [Vasquez] even though the police had not yet revealed Copas' identity. Moreover, none of the substance of Copas' testimony was ever retracted or recounted by Copas.

Id. (footnote added).

On this basis, the magistrate judge concluded the evidence of the agreement between Copas and the prosecution was not

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8. Singh's attorney points out that if Copas were the actual perpetrator of the murders (the evidence strongly suggests such a possibility), Copas could easily attribute to Singh the "plan" that Copas actually pursued in committing the murders in order to remove any suspicion against him, and to gain favorable treatment as to his own criminal charges. *See* Appellant's Br. at 44. Given this possibility, the conclusion that Copas' earlier statements corroborate his testimony is highly questionable.

material, because there was no reasonable probability that had evidence of the agreement had been disclosed, the result of Singh's trial would have been different.[9] The district court[10] adopted the report and recommendations of the magistrate judge and denied the petition with prejudice. This court granted a certificate of probable cause to appeal, and this appeal followed.

Discussion

Singh makes essentially the same contentions to this court that he made to the district court. The primary issue in the present appeal is whether the district court correctly concluded that the undisclosed evidence of an agreement to provide benefits to Copas in exchange for his testimony at Singh's trial was not material. Our *de novo* review of the record in this case compels us to conclude the district court's decision was not correct.

Materiality of the Undisclosed Evidence

The requirements of due process obligate a prosecutor to disclose material exculpatory evidence on its own motion and without request. *See Kyles v. Whitley*, 514 U.S. 419, 432-34 (1995);

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9. The judge deferred to the state habeas appellate court's finding that any evidence Copas testified falsely concerning his heroin use was inadmissible hearsay. Thus, the judge concluded the prosecution did not make knowing use of perjury regarding Copas' heroin use before trial.

Further, the judge noted that at trial, Copas was only asked why he originally gave his statement to police. Defense counsel did not question Copas regarding his motivation for testifying at Singh's trial. Thus, the judge concluded Copas did not perjure himself when he testified about his motivation for originally approaching police with information about the murders, and therefore, the prosecution did not make knowing use of perjury regarding benefits to Copas.

10. The Honorable Robert J. Timlin, United States District Judge for the Central District of California.

United States v. Agurs, 427 U.S. 97, 107-08 (1976). "Evidence impeaching the testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence." *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1992) (citing *Giglio v. United States*, 405 U.S. 150, 154 (1972)).

The prosecutor's nondisclosure of the benefits given to Copas in exchange for his testimony violated Singh's right to due process and a fair trial only if the undisclosed evidence was material. *See United States v. Bagley*, 473 U.S. 667, 678 (1985). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. As the Supreme Court has observed: "A 'reasonable probability' of a different result is accordingly shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles*, 514 U.S. at 434 (citing *Bagley*, 473 U.S. at 678).

We begin our assessment of the materiality of the undisclosed evidence of an agreement to provide benefits to Copas in exchange for his testimony by appraising the importance of Copas' testimony to the prosecution's case. Police did not arrest Singh until after Copas approached police with information about Singh's alleged attempt to hire Copas to murder Grace. The prosecution conceded Singh did not kill Grace and Daphne, and only circumstantial evidence tied Singh to the murders. An important theory of the prosecution's case was that since Singh had once tried to hire Copas to murder Grace, he later hired some other individual or individuals to carry out the murder. It is likely the jury had to believe Copas' testimony in order to believe the prosecution's theory. For these reasons, Copas was the key witness who linked Singh to the murder-for-hire scheme. Therefore, we

deem it obvious that Copas' credibility was vital to the prosecution's case.[11]

The record in this case demonstrates Copas received substantial benefits after approaching police with information regarding the Singh murders. On April 7, 1984, police arrested Copas on a theft charge. The charge was later rejected for prosecution by the San Bernardino County district attorney's office. On December 9, 1984, police arrested Copas for burglary. The next day, the district attorney's office rejected this charge for prosecution. On April 12, 1985, police arrested Copas on a charge of being under the influence of heroin. Three days later, Copas was released on his own recognizance.

On May 12, 1985, police arrested Copas for a March 28, 1985[12] burglary as well as for narcotics use and petty theft. On May 15, 1985, Stout made an unprecedented appearance on behalf of Copas and made a motion for the release of Copas on his own recognizance. Copas eventually obtained multiple continuances of the March 28, 1985 burglary charge. On August 1, 1985, the State dismissed six charges pending against Copas involving theft, narcotics, and traffic offenses, in return for Copas' plea of guilty to the March 28th burglary charge. Sentencing on this charge was repeatedly delayed until March 19, 1986.

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11. It appears Copas' credibility was also vital to the prosecution's successful opposition to Singh's motion for a new trial. During the hearing on Singh's motion, an individual named Andrew Larry testified that while he was incarcerated in the same institution as Copas, Copas told him he could get Singh off for a price, and Copas had pinned the murders on Singh to get out of his own legal trouble. At the hearing, Copas testified he never made such statements to Andrew Larry.

12. Police first arrested Copas for this burglary on March 28, 1985, but later released him because initial police reports were insufficient to support the charge.

Meanwhile, police arrested Copas on December 1, 1985 for a new burglary charge. This matter was repeatedly continued until February 5, 1986, when Copas pleaded guilty to the charge as a result of a plea agreement between Copas' defense counsel and the deputy district attorney. Citing Copas' efforts as a citizen in Singh's murder trial, the presiding judge approved a plea agreement whereby Copas would serve a maximum of one year in jail.

In March 1986, Copas was sentenced for both the March 1985 burglary and the December 1985 burglary. Copas received three years limited supervised probation on the March 1985 burglary with a requirement that he serve 365 days in jail. He received a suspended sentence for the December 1985 burglary. Sometime later, Copas asked the sentencing judge for a reduced sentence on account of his testimony in the Singh case. Stout recommended that Copas' sentence be reduced on condition that the court order Copas to return to court to testify at the hearing on Singh's motion for a new trial. The court reduced Copas' sentence and modified it to credit the 151 days Copas had already served. The court ordered Copas to return to court to testify at Singh's motion for a new trial.

Copas received substantial benefits in exchange for his testimony at Singh's trial. Disclosure of an agreement to provide such benefits, as well as evidence of the benefits themselves, could have allowed the jury to reasonably conclude Copas had a motive other than altruism for testifying on behalf of the State. Such a finding could have substantially impeached Copas' credibility as a witness.

Although the magistrate judge acknowledged that evidence of the benefits to Copas was impeachment evidence that could have undermined Copas' credibility as a witness, the magistrate judge weighed this evidence against "the likelihood that Copas' credibility would have been rehabilitated, because Copas' first statement to police was made without any deals, and the essence of that

statement was consistent with Copas' trial testimony." *Singh v. Prunty*, No. CV-96-0057 (C.D. Cal. 1996) (magistrate judge's report and recommendation). The magistrate judge later concluded "Copas' prior consistent statement to police would have rehabilitated Copas and rendered even the additional impeachment evidence of marginal consequence. In any event, Copas was never impeached concerning the substance of his testimony against [Singh]." *Id.* (footnote omitted).

The conclusion that Copas' credibility would have been rehabilitated because of his prior consistent statements to police fails to acknowledge the circumstances surrounding those statements. Copas was in jail when he first contacted the police with information about his prior dealings with Singh. After providing police with the information, he was released from custody. Copas gained release notwithstanding a pending a five-count theft case against him and the fact that he was on probation for a 1981 assault conviction and a 1982 trespass charge. A jury apprised of these circumstances could have concluded that Copas' prior consistent statements to police were given for reasons other than Copas' claimed concern over Daphne's murder.

We recognize that conflicting arguments can be made regarding the effect the disclosure of the evidence of benefits to Copas may have had on Copas' credibility as a witness. However, our fundamental concern remains whether there exists a reasonable probability that given disclosure of the evidence of benefits to Copas, one or more members of the jury would have viewed Copas' testimony in a different light. Given the importance of Copas' testimony to the prosecution's case, and the impact the disclosure of evidence of the benefits provided to Copas could have had on Copas' credibility, we believe there is a reasonable probability that had the evidence been disclosed to the defense, one or more members of the jury could have viewed Copas' testimony differently.

Furthermore, evidence of these benefits would have undermined the state prosecutor's closing argument. During that argument, Stout asserted:

> Take a look at the motive of each and every witness that testified in this case as to why they would fabricate and lie. And you'll find out that the only one in here that came up with -- that has a real motive for lying and fabricating is the defendant. . . . There's been no shenanigans, no hiding anything. No attempts to deceive by anyone's part in this particular case.

See Appellant's Br. at 20.

During the evidentiary hearing on Singh's state habeas petition, Stout conceded it might have been "the kiss of death" to the State's case if the jury heard Copas was in essence being rewarded for his testimony with some kind of benefits. With all due respect to the state court of appeal, which felt otherwise, we deem Stout's candid concession to be highly significant. In the adversarial process, the prosecutor, more than neutral jurists, can better perceive the weakness of the state's case. After all, it is the prosecutor who has the duty to determine whether the information is material and whether it should be disclosed. *See Kyles*, 514 U.S. at 437.

As Justice Souter recently observed:

> [T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. . . . [A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.

Kyles, 514 U.S. at 437, 439. In this case, we conclude Stout "tack[ed] too close to the wind."

Conclusion

The prosecution's suppression of evidence of the agreement to provide benefits to Copas in exchange for his testimony undermines our confidence in the outcome of Singh's trial. The suppressed evidence was therefore material, and due process required its disclosure. *See Kyles*, 514 U.S. at 434.

We find strong support for our conclusion in the opinion of Judge Ziebarth, the judge who initially addressed Singh's state habeas petition and the only judicial officer to conduct an evidentiary hearing on Singh's petition. Following this hearing, Judge Ziebarth concluded:

> This court has reviewed and considered the pertinent parts of the trial transcript that was stipulated by counsel to be a part of the evidence in this matter. The prosecution produced a lot of circumstantial evidence during the petitioner's trial that points toward his guilt of the charged offenses. However, the contents of the trial record make it clear that Ray Copas was the key witness for the prosecution. His credibility as a witness was a vital factor in the prosecution's case.
>
> Had the jury been made aware of the facts regarding Copas which were discussed above that Mr. Stout failed to disclose to defense counsel or to the jury, the jury's assessment of the credibility of Mr. Copas could have been greatly affected. It is conceivable that different verdicts would have resulted.

In re Singh, No. WHC 2262, slip op. at 17 (Cal. Super. Ct. Feb. 16, 1994).

We acknowledge that the magistrate judge cited evidence implicating Singh in the murders that is independent of Copas' testimony. However, it should be kept in mind that Copas, a heroin addict at the time he approached police claiming to have information on the Singh murders, could have easily fabricated his statement implicating Singh in order to facilitate his own gain. Because of the stark reality of this possibility, this circuit has stated that when a witness is a heroin addict who provides evidence against a defendant for some personal advantage or vindication, it is appropriate for a court to give the jury an instruction indicating that these circumstances may affect the witness' credibility, and the jury should therefore consider the witness' testimony with greater care than that of an ordinary witness. *See, e.g., Territory of Guam v. Dela Rosa*, 644 F.2d 1257, 1259-61 (9th Cir. 1980). In the event the jury had concluded Copas lacked credibility and had fabricated his testimony regarding Singh's attempt to hire Copas to murder Grace, it is entirely speculative to conclude that the same jury would have nonetheless convicted Singh. In light of the overall record, and the prosecution's knowing and deliberate suppression of the evidence of benefits given to Copas because disclosure of the evidence would have substantially weakened the State's case, the probabilities of a different outcome in Singh's trial, had the evidence been disclosed, preponderate in favor of Singh rather than the State.

The judgment is reversed. This case is remanded to the district court with directions to issue an unconditional writ of habeas corpus unless the State of California grants a new trial to Singh within a reasonable time following issuance of the district court's order.[13]

REVERSED.

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13. Because of our conclusion that the State's suppression of evidence violated Singh's constitutional rights to due process and a fair trial, we do not address Singh's allegations that the State knowingly allowed Copas to commit perjury during his trial testimony.

ORDER
Filed July 1, 1998

[Caption Omitted in Printing]

Before: LAY,* GOODWIN and SCHROEDER, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Honorable Donald P. Lay, Senior Circuit Judge for the Eighth Circuit, sitting by designation.